(24,797)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 514.

GUNDER NORDGARD, PLAINTIFF IN ERROR,

vs.

MARYSVILLE & NORTHERN RAILWAY COMPANY AND STIMSON MILL COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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a United States Circuit Court of Appeals for the Ninth Circuit.

No. 2398.

GUNDER NORDGARD, Plaintiff in Error,
v.
MARYSVILLE & NORTHERN RAILWAY COMPANY, a Corporation, and STIMSON MILL COMPANY, a Corporation, Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Received and filed April 4, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
(Signed) By MEREDITH SAWYER,
Deputy Clerk.

1 In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2364.

GUNDER NORDGARD, Plaintiff,
vs.
MARYSVILLE & NORTHERN RAILWAY COMPANY and STIMSON MILL COMPANY, Defendant-.

Names and Addresses of Counsel.

John T. Casey, Esq., Attorney for Plaintiff in Error, 440 New York Block, Seattle, Washington.
F. C. Hughes, Esq., Attorney for Defendant in Error, 661 Colman Building, Seattle, Washington.
Maurice McMicken, Esq., Attorney for Defendant in Error, 661 Colman Building, Seattle, Washington.
Wm. T. Dovell, Esq., Attorney for Defendant in Error, 661 Colman Building, Seattle, Washington.
H. J. Ramsey, Esq., Attorney for Defendant in Error, 661 Colman Building, Seattle, Washington.

[1*]

[Title of Court and Cause.]

Complaint.

Plaintiff complains of the defendants and for cause of action alleges:

I.

That the plaintiff prior to July 29, 1912, was a strong, vigorous, healthy young man of the age of twenty-three years and earning and able to earn good wages as a railroad brakeman and other kinds and classes of labor.

II.

That the defendants, Marysville and Northern Railway Co. and Stimson Mill Co. are both corporations organized and doing
2 business under the laws of the State of Washington and said defendants own, control and operate a railroad in Snohomish County, Washington, from the town of Marysville in a Northerly and Easterly direction.

III.

That the said defendants also own, control and operate boats and tugs on the Interstate and International waters of Puget Sound and elsewhere and said defendants in the operation of said railroad, boats and tugs, [2] are common carriers engaged, among other things, in Inter-state and Foreign commerce.

IV.

That the defendant corporations are and on the 29th day of July, 1912 were engaged in the hauling of timbers and logs with engines and cars, over said railroad track and at said time said defendant corporations were engaged as common carriers and were hauling logs over said railroad towards the town of Marysville in Snohomish County, Washington, and were dumping said logs into the waters of Puget Sound at said town of Marysville and from said point were drawing and sending said timbers and logs to various parts of the United States and the world and were then and there engaged in Interstate and foreign commerce and plaintiff was then and there employed in said work by the defendants.

V.

That at said time the defendants adopted a careless, negligent and unsafe way and manner of unloading said logs from the trucks and cars on which the same were loaded and defendants also employed careless and negligent agents, servants and employees to do their work at said time and place and said defendants, their agents

[* Page number of Orig. Type. Transcript of Record.]

and servants fastened and caused to be fastened, chains over and around said logs and said chains were fastened by the de-
3 fendants on the side of said cars towards the water and the defendants directed and required plaintiff to go beneath said cars on the lower or water side of the same to unfasten and open said chains; that said chains could have better been fastened on the upper side of said cars where the same could be opened and unfastened without any danger to plaintiff or others engaged in said work.

[3] VI.

That on said 29th day of July, 1912, while plaintiff was beneath one of said cars unfastening said chains on the lower or water side of said cars and trucks, the defendants, their agents and servants carelessly and negligently and without any notice or warning to plaintiff, caused and allowed the chains at the other end of said logs to be loosened and unfastened and caused and allowed the logs on said trucks and cars to be turned loose and the said logs at said time and place rolled down on top of and over plaintiff and struck plaintiff and knocked him into the said waters of Puget Sound to his injury and damage as hereinafter stated.

VII.

That at said time plaintiff's back was broken and a number of his ribs fractured and crushed and his arms, head and nearly all parts of his body were bruised, mutilated and crushed and ever since said time plaintiff has been a helpless cripple confined in the hospital and plaintiff always will be a helpless and hopeless cripple for the balance of his life and the lower parts of plaintiff's body and both of his legs are completely paralized and always will be paralized and the parts and organs in the lower part of his body will not now and never again will perform their office in the regular or natural way and plaintiff has completely lost his manhood and plaintiff will always be in a helpless condition to be cared for like a baby, and plaintiff has since said time suffered and always will suffer
4 from large and running bed sores on the lower part of his body; that plaintiff, through all of said injuries caused by the fault, carelessness and neglect of the defendants and each of them, as aforesaid, [4] has up to the present time suffered great pain and mortification and plaintiff will as long as he lives suffer great pain, humiliation and mortification to his damage in the sum of One hundred thousand ($100,000.) Dollars, including One thousand ($1000.) Dollars and more damages up to the present time for doctor's services and hospital charges.

VIII.

That all of said injuries to plaintiff resulted entirely through the fault, carelessness and negligence of the defendants and each of them and through the fault, carelessness and negligence of their servants,

agents and employees for which defendants are responsible and not through any act, deed, omission or fault on the part of plaintiff and plaintiff is seeking to recover the aforesaid damages for said injuries from defendants and claims the benefit of the laws of the State of Washington and also claims the benefit of the Act of Congress of the United States approved April 22nd, 1908, being an Act relating to the liability of a common carrier to its employees and all other laws passed by Congress, bearing upon the relations of master and servant.

Wherefore plaintiff prays for judgment against the defendants and against each of them for the sum of One hundred thousand ($100,000.) Dollars together with his costs and disbursements in this action.

JOHN T. CASEY,
Attorney for Plaintiff. [5]

5 [Verification.]

[Indorsed: Filed Dec. 14, 1912.] [6]

[Title of Court and Cause.]

Amended Answer.

Come now the defendants and, by leave of Court, file herein their amended answer to plaintiff's complaint, and aver:

I.

Answering Paragraph II, they admit that each of the defendants is a corporation organized and doing business under the laws of the State of Washington, and that the defendant Marysville & Northern Railway Company owns and operates a railroad in Snohomish County, Washington, between the timber lands owned by the Stimson Mill Company and the waters of Snohomish River near the town of Marysville, and that said Stimson Mill Company owns and controls the capital stock of said Marysville & Northern Railway Company.

II.

Answering Paragraph III, defendants admit that the Stimson Mill Company owns, controls and operates tug-boats on the waters of Puget Sound and the streams tributary thereto, but defendants deny that in the operation of said railroad or tug-boats they are common carriers or engaged in interstate and [7] foreign commerce, and deny each and every of the remaining allegations in said paragraph.

III.

Answering Paragraph IV, these defendants admit that on the 29th of July, 1912, they were engaged in the hauling of timbers

and logs of said Stimson Mill Company with engines and cars over said railroad track, and were hauling said logs over the said railroad
from logging camps of the Stimson Mill Company to the
6 Snohomish River near the town of Marysville in Snohomish
County, and were dumping said logs into one of the mouths of said river, a tributary to the waters of Puget Sound, and that the plaintiff was then employed in said work; but defendants deny each and every of the remaining allegations of said Paragraph IV.

IV.

Answering Paragraph V of said complaint, defendants admit that the agents and servants of said Railway Company fastened or caused to be fastened chains over and around the said logs, that said chains were fastened on the side of said cars towards the water, but they deny each and every of the remaining allegations in said paragraph.

V.

Answering Paragraph VI, defendants admit that on the 29th of July, 1912, while plaintiff was engaged in unfastening chains on the water side of one of said cars, the logs on said car rolled down and struck plaintiff and knocked him into the waters of Puget Sound, but as to the nature or extent of plaintiff's injuries, they deny knowledge or information sufficient to form a belief, and they deny each and every of the remaining allegations in said paragraph. [8]

VI.

As to each and every of the allegations contained in Paragraph VII, defendants deny any knowledge or information sufficient to form a belief, and especially deny that said plaintiff was damaged in the sum of $100,000 or any other sum.

VII.

Defendants deny each and every of the allegations of Paragraph
VII of said complaint, and expressly deny that the plaintiff
7 is entitled to the benefit of the Act of Congress of the United
States approved April 22, 1908, being an Act relating to the liability of a common carrier to its employees.

Further answering and as a first affirmative defense, these defendants aver:

I.

That the Marysville & Northern Railway Company is a corporation organized and existing under the laws of the State of Washington, and that it owns and operates a short line of railroad in the County of Snohomish in said State in carrying the logs and timber of defendant Stimson Mill Company, and that said Stimson Mill Company owns the capital stock of said Railroad; that each of these defendants has complied with the requirements of Chapter

74 of the Session Laws of 1911 of the State of Washington, being an Act relating to compensation to injured workmen, and has, since the enactment of said law, regularly paid all their premiums to the State, in accordance with the schedule of contribution as provided in said Act.

II.

That this plaintiff has duly applied for and has been [9] allowed and received vouchers for compensation under and in pursuance of the terms of said act out of the funds provided thereby, and for which the aforesaid premiums of these defendants were contributed and paid.

III.

That by the terms of said Act all civil actions and causes of action for such personal injuries as are described in plaintiff's complaint and all jurisdiction of all courts of the State over such causes were abolished.

8 IV.

These defendants aver that plaintiff is now estopped to prosecute this action or to claim that these defendants are or at any time have been engaged as interstate carriers by railroad, or that plaintiff was at the time of his employment engaged in such service, or that the Act of Congress approved April 22, 1908, relating to the liability of a common -arrier to its employes, has any application to the defendants herein or either of them.

Wherefore, defendants pray that plaintiff's action be dismissed and that they recover their costs herein.

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Defendants. [10]

[Verification.]

[Served Oct. 21, 1913.] [Indorsed: Filed Oct. 22, 1913.] [11]

[Title of Court and Cause.]

Judgment of Dismissal.

[U. S. District Court.]

The above entitled cause coming on regularly for hearing before the Court, the plaintiff appeared by his attorney John T. Casey, and the defendants appeared by their attorneys Hughes, McMicken, Dovell & Ramsey; and thereupon a jury was impaneled and sworn to try said cause, and the plaintiff and defendants having introduced their proofs, respectively, and rested, the defendants did thereupon move the Court to direct that a verdict and judgment be returned and entered in this cause in favor of the defendants, which motion

was based upon the following grounds, to-wit: First, that it has not been established by the plaintiff that the defendants, or either of them, are common carriers by railroad or were so engaged at the time involved in the complaint in this action; Second, that it has not been established by the testimony in this cause that
9 the defendants, or either of them, were engaged as common carriers by railroad in interstate commerce at the time the alleged injuries were received; Third, that it has not been established that the plaintiff was employed in such [12] capacity at the time of receiving his injuries, or in any capacity necessarily incident to the carriage by railroad as common carrier of interstate commerce.

And the Court, having heard the arguments of counsel and having heard and considered all the evidence in said cause, and being convinced that there was an entire failure of proof on the part of the plaintiff upon the allegations of his complaint, did thereupon withdraw said cause from the jury, and did order that judgment of dismissal on the merits of said cause be entered.

Wherefore, it is now ordered and adjudged by the court, that plaintiff's cause be and it is hereby dismissed upon the merits, and that defendants have and recover their costs and disbursements herein to be taxed; to which ruling, order and judgment of the Court the plaintiff at the time excepted, and his exception was allowed.

Done in open Court this 23rd day of October, A. D. 1913.

JEREMIAH NETERER, *Judge.*

O. K. as to form.

JOHN T. CASEY.

[Served Oct. 25, 1913.] [Indorsed: Filed Oct. 25, 1913.] [13]

[Title of Court and Cause.]

Filed Feb. 21, 1914.

John T. Casey, for Plaintiff.
10 Hughes, McMicken, Dovell & Ramsey, for Defendant.

On Motion for a New Trial After Non-suit. Motion Denied.

NETERER, *District Judge:*

The testimony in this case shows that the defendant was a common carrier and was carrying logs on its railroad or logging road from the forests in the state of Washington to Puget Sound; that it employed the plaintiff in such transportation; that the logs were dumped into the waters of Puget Sound, and thereafter a part of the logs were disposed of to various mills on the sound, the remaining logs being taken to the Stimson Mill Company also on Puget Sound

and there manufactured into lumber. This lumber was piled in the lumber yard, and about 20% was sold in the local market, and the remainder shipped upon orders thereafter obtained either by rail or boat to various points in the state of Washington and other states and foreign countries. At the conclusion of the testimony, the defendants moved for a directed verdict, and a judgment was entered in favor of the defendants. The matter is now before the court upon a motion for a new trial.

The contention of the plaintiff that the court in granting judgment on the motion for a directed verdict violated the 7th Amendment to the Constitution has no merit. The Supreme Court of the United States in an unbroken line of decisions has held that where the evidence produced at the trial was not [14] sufficient to sustain a verdict, it is the duty of the court not to submit the matter to the jury. This is expressly sustained in Slocum v. New York Life Ins. Co., 227 U. S. 364, cited by the plaintiff, and this rule is adhered to by this court in Bay v. Merrill Lumber Co., — Fed. —, Filed Feb. 20, 1914.

Does the testimony show that the defendant was engaged in interstate or foreign commerce, and that the plaintiff was injured while employed in such transportation? If it does, a motion for a
11 new trial must be granted.

Second Employers' Liability Cases, 223 U. S. 1.
Pedersen v. Del., Lack. & West. Ry., 229 U. S. 146.

It is contended that, the local demand not being sufficient to consume all the lumber, it therefore was intended for interstate or foreign shipment. It has been uniformly held by the Supreme Court of the United States that a commodity is not in interstate commerce until it has entered upon its final passage to another state or foreign country.

"Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced."

The Daniel Ball Case, 10 Wall. 563.

"When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an intrepot for that particular region, whether on a river or a line of railroads, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state."

Coe v. Errol, 116 U. S. 517, 525.

"Continuity of movement is the concluding factor in determining whether a commodity has started on its ultimate passage to a foreign state."

Sabine Tram case, 227 U. S. 111.

The logs in issue or their product had not begun to move from the state of Washington to another state or foreign country. The relation of foreign commerce at no time had been acquired. No continuity of movement had at any time been inaugurated. The entire product of the logs not sold to other local mills was accumulated in the millyard of the Stimson Mill Company [15] awaiting orders, either local or foreign, and it cannot be determined
12 whether the product of the logs at the time they were transported, in the act of which the plaintiff was injured, would be intrastate, interstate or foreign commerce, and this cannot be ascertained until after the orders had been received. There was nothing to prevent all being sold locally or shipped to points within the state, if demand had been made. The shipment of the logs to the waters of Puget Sound and the transporting of a portion of these logs to the Stimson Mill Company, where they were manufactured into lumber, which was afterwards sold, cannot be said to have entered then upon a final journey to their ultimate destination at the time they were transported over the railroad or logging road. How can it be said that the product of the logs was interstate commerce when the Supreme Court of the United States in Bacon v. Illinois, 227 U. S. 504, held where grain was purchased in localities in a number of states and shipped by original owners who were residents of such states and consigned to Philadelphia, New York and other eastern cities, place of ultimate destination, the owner reserving the right to remove the grain at Chicago for the purpose of weighing, cleaning, inspectinf, etc., and thereafter the grain to be shipped to consignees at the election of the owner, held that the interstate character was ended when it was temporarily removed from the cars in Chicago for the purpose designated. In the instant case the interstate character had never been initiated.

The authorities cited by the plaintiff are not in point here.

Bay v. Merrill & Ring Lumber Co., — Fed. —, Filed Feb. 20, 1914.

The motion for a new trial is denied.

JEREMIAH NETERER,
Judge. [16]

[Indorsed: Filed Feb. 21, 1914.] [17]

13 [Title of Court and Cause.]

Stipulation as to Bill of Exceptions.

It is hereby stipulated and agreed, by and between the parties hereto, that the annexed bill of exceptions may be filed and certified by the Court as the bill of exceptions in this cause.

Dated: March 31, 1914.

JOHN T. CASEY,
Attorney for Plaintiff.
HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Defendants. [18]

[Title of Court and Cause.]

Bill of Exceptions.

Be it remembered, that heretofore, to-wit, on the 22nd day of October, 1913, the above entitled cause came regularly on for trial in the above named Court before the Honorable Jeremiah Neterer, Judge of said Court, the plaintiff appearing by John T. Casey, Esq., his attorney and counsel, and the defendants appearing by E. C. Hughes, Esq., of Hughes, McMicken, Dovell & Ramsey, their attorneys and counsel, and the following proceedings were had, to-wit:

A jury having been duly impaneled and sworn, the plaintiff, to sustain the issues on his part, introduced and offered in evidence the following testimony, to-wit:

Counsel for the plaintiff read the following written stipulation of the parties:

"It is hereby stipulated between the parties hereto that the following may be accepted as facts for the purpose of the trial of this cause so far as they may be deemed or held to be material to any of the issues therein, to-wit:

14

I.

That the Marysville & Northern Railway Company was organized as a common carrier railroad; that said railroad has ever since been and now is employed in transporting the logging products of the lands of the Stimson Mill Company [19] and dumping them into the waters of Ebey Slough, a tributary of Puget Sound near the town of Marysville in Snohomish County, Washington.

II.

That during the month of July, 1912, and prior and subsequent thereto, said railroad was owned and controlled by the stockholders of the Stimson Mill Company; that J. F. Ives was during said times the manager of both of said companies, but the railroad company had its own superintendent, who had no connection with the mill company.

III.

That of the logs, timbers and poles hauled by the defendant railway company over its road for the defendant mill company in July, 1912, and unloaded into Ebey Slough as aforesaid, about one-third were sold and delivered to the purchasers at said point, and the balance were towed to the saw mill of the Stimson Mill Company at Ballard, Washington, and there cut and prepared for market; that the towing of said logs was done in part by the tug of the Stimson Mill Company and in part by other tugs hired for that purpose.

IV.

That the lumber products so manufactured out of said logs, timbers, etc. by the Stimson Mill Company were during the month of July, 1912, and ever since have been disposed of by it as follows: About twenty to twenty-five per cent. sold for use in the local market and delivered to the purchaser at the mill; the balance sold
15 for shipment out of the state, either by water or rail, and delivered on board vessels or cars to the purchaser at Ballard, Washington, billed as directed by the purchaser; that during said time none of the said lumber products have been shipped out of the state by any vessel or other means of transportation owned or controlled by the Stimson Mill Company.

This stipulation shall not limit either party in the right to introduce other proofs relating to any of the foregoing matters.

Dated: June 3rd, 1913.

(Signed) JOHN T. CASEY,
Attorney for Plaintiff.
HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Defendants."

GUNDER NORDGARD, being first duly sworn, testified on his own behalf as follows:

Direct examination.

(By Mr. Casey:)

On the 29th day of July, 1912, I was working at Bryant, braking on the Marysville & Northern railroad for the defendants [20] in this case. At the time I was injured I was at Marysville unloading logs. This was my third summer with the defendants. I have been over the line of the Company quite frequently. The country thereabouts is a heavily timbered country and there is quite a lot of timber in the neighborhood. There is other timber along the railroad besides the Stimsons'. In my work I hauled freight for parties other than the Stimsons. My work was braking and I had to load and unload stuff that came. We used to haul stuff for the Japs; judging by the characters on the packages it came from either Japan or China; it was Japanese or Chinese writing. That was freight. We also hauled some poles for a pole man in Everett. I don't know how often, but perhaps a couple or three times a week; there were
16 generally two or three cars at a time.

(The plaintiff thereupon testified that while unloading one of the cars a log rolled down on his shoulder and broke his back, rendering him unconscious and permanently disabled; and further described the manner in which the injury occurred, which it is admitted is immaterial for the purposes of this bill of exceptions.)

The accident occurred at the terminus of the railroad near the town of Marysville, where the logs are dumped from the cars into

Ebey Slough, an arm of the Snohomish River, where the tide ebbs and flows. The chains holding the logs on the cars were fastened on the water side; they could have been as efficiently fastened on the other side, and there would not have been the same degree of danger. [21]

Cross-examination.

(By Mr. Hughes:)

During all three of the summers I spent working there I had been doing the same work. I was only occasionally at the camp at Bryant; my regular work was from Bryant down to the river. The logs are cut in the camp and brought down by the switch engine to Bryant; the camp is just above Bryant. Then from Bryant this engine and the train crew took the carload of logs in a train and hauled them down from Bryant and dumped them into the water of Ebey Slough just below Marysville. It was my work to collect cars, get them at Bryant, and then come down and unload them at Ebey Slough.

Redirect examination.

(By Mr. Casey:)

The railroad is sixteen miles long. Farmers live along there; we did some hauling for them over this railroad. This railroad is connected with the Northern Pacific at Bryant. This railroad is connected with Copp & Haley's logging road, which is connected with the Great Northern railroad at Marysville.

17 "Q. Did you ever haul cars of the other companies over this road?

A. Why, no, we didn't do much of that.

Mr. Hughes: You di-n't do any of it, did you?

A. Well, on one occasion there we hauled some potatoes there from Marysville."

We were hauling freight about once a week for the Company and it seems to me there was some of this stuff marked with Japanese characters almost every time. I hauled it from Marysville to Bryant.

Recross-examination.

(By Mr. Hughes:)

These Japanese were working at the camp up there and these supplies were hauled up for the Stimson Mill Company. The potatoes were hauled up for the Stimson Mill Company. I don't know what, if anything, the Company charged. We hauled one carload of lumber for a farmer there once. I don't know anything about the charges for it. [22]

B. H. VOLLANS, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

(By Mr. Casey:)

I am a dealer in cedar poles and piling and in my business have dealt with the Stimson Mill Company and the Marysville & Northern Railway Company. During the year 1912 they hauled poles and piling for me; I paid them for it. I sell about sixty per cent. of them in California and forty per cent. locally.

Cross-examination.

(By Mr. Hughes:)

My dealings were entirely with the Stimson Mill Company. I bought the poles from them and they delivered them into the water at Ebey Slough, where they were received by me. I paid so much a pole delivered in the water at Ebey Slough. There I took
18 the poles, rafted them and towed them away. This was prior to April, 1912.

Redirect examination.

(By Mr. Casey:)

The contract was so much a thousand delivered in the water at Ebey Slough, including the hauling over the railroad.

Defendants' Evidence.

J. F. IVES, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct examination.

(By Mr. Hughes:)

I am Vice President of the Stimson Mill Company, and also of the Marysville & Northern Railway Company. The railroad of the Marysville & Northern runs from a crossing with the Northern Pacific at Bryant down to Marysville. It is owned by the Stimson Mill Company, which also owns timber [23] lands above Bryant. Stimson Mill Company owns all lands tributary to this railroad and its logging branches. It is engaged in the business of logging and sawing lumber. They cut and haul their own logs. The Marysville & Northern Railway Company hauls the logs of the Stimson Mill Company and does no other business. The railroad has never filed a Tariff rate with the Interstate Commerce Commission. It has never been engaged in the business of hauling freight or distributing it over other lines of road, nor does it haul freight to markets for the locality through which it runs. It does not haul the freight or

produce of farmers or merchants, or anything of that kind. Besides the timber, we have hauled supplies for our camp. With reference to the packages having Japanese characters marked upon them, to which reference has been made, we had a lot of Japanese working at the camp and we used to haul stuff up to them without charge, small packages that came from Japanese firms in Seattle.

Some gravel was sold and delivered to the Town of Marysville
19 for the purpose of fixing the streets. There was no freight rate or anything of the kind on it. We have never done any hauling for hire. The carload of lumber referred to was hauled for Mr. Kountz, a friend of ours. He was going to start a logging camp and we hauled it for him, as an accommodation, for just what it cost us to haul. The poles of which Mr. Vollans spoke were sold to him delivered in the water; we didn't haul them as a carrier; it was in the business of logging we hauled them. After our logs are dumped in the water we sell some of them there, some of them we bring to Ballard and manufacture into lumber, and some of them we sell after we bring them to Ballard. Those that are sold in the slough the purchaser rafts and tows away himself. [24]

Cross-examination.

[By Mr. Casey:]

The Marysville & Northern Railway Company makes no charge whatever for hauling the logs of the Stimson Mill Company. The Stimson Mill Company simply pays the railroad company's bills. The Marysville & Northern Railway Company is simply a subsidiary concern of the Stimson Mill Company. The Mill Company owns a tug, a launch and one schooner. The schooner runs from Willapa Harbor and Grays Harbor to the west coast of South America. It takes no lumber from our place. It takes lumber from other places. The schooner carries no lumber from our own mill, nor does it carry any of our lumber. We do not now and never have maintained an office in San Francisco. We have an agent in San Francisco who sells lumber on commission. We sell lumber to him; he places an order with us and we give it to him on one of his ships that come here. He has a good many steam schooners that come up here, and we put it on the barges or they come to the dock and take it away.

We sell it to him on board those vessels. We make the deliv-
20 ery to his vessel. He sells it before he places the order. For the last five years we have not sent over five million feet a year to him. Some of that we take out of the woods in Snohomish County. Five or ten million feet of lumber a year is taken out of the woods in Snohomish County down over this railroad, then hauled by tugs to the mill at Ballard, then cut up and sent to eastern States.

The goods taken up there with Japanese characters on them were sold by a Japanese merchant in Seattle to our employes and taken to them by us without charge.

The railroad extends for three or four miles beyond Bryant, but I can hardly say whether that part belongs to the Stimson Mill Com-

pany directly or to the Marysville & [25] Northern, for we have never kept it separate. We pay all their bills and it is almost the same thing. The railroad is engaged in hauling these logs, poles and piling from Bryant down to Marysville. We do not haul poles for other people than ourselves. No charge is made to Mr. Vollans for hauling; he buys the poles delivered in the water at Marysville.

Redirect examination.

(By Mr. Hughes:)

We have no cars or equipment to enable us to haul freight or sent it out connecting with other railroads. Our equipment would not be allowed on the main lines. It is simply an equipment for the logging business. The capacity of the mill at Ballard is 175,000 feet in ten hours. We manufacture mostly our own logs. We sell all of our products here; part of it goes to the local market in Seattle; as to the rest of it we receive orders and deliver it on cars, billed to the party who orders it. If anybody orders a carload of lumber we put it on the car for him. If a foreign vessel comes in we load it
21 and it takes the lumber away from the mill. Mr. Baxter in California will call up and ask me if I can bill such and such an order and how much I will charge for it. He may not place the order with us; he sells for other mills; he is a broker and shipowner. He sends ships in which he is interested for the lumber. When he places the order with us he gets a brokerage commission, and that is the only relation he has with us. When we receive an order for shipment to California, we cut it in the mill, pile it on the dock, and a steamer comes alongside the dock and herself loads it *it* on board. We are paid here. In case of carload lots we are paid on the delivery of the shipping bill. [26]

The Stimson Mill Company is only a part owner in the steamer mentioned. I have managed her for the past five years. Mr. Baxter has chartered her sometimes from San Francisco. He has been taking the charter on her; we pay him 1½% for getting a charter for her. She is under charter all of the time and has not been operated by her owners for many years; they have nothing to do with the voyages she makes. The schooner which has been mentioned is chartered, say, from Willapa Harbor to the west coast of South America. The man who charters her, and not the owner, determines her cargo and where she will run and all these matters.

Recross-examination.

(By Mr. Casey:)

We do not sell any lumber in foreign markets. We sell most of our lumber here, and what we sell East we sell to the selling agency here, after which we have nothing to do with it. They ship it to the Eastern market. We place it on the cars, but we do not load the boats.

Redirect examination.

(By Mr. Hughes:)

The lumber which is brought out of the woods is not brought as lumber, but as logs, and is sent to the mill, where, with other
22 logs which we buy, it is manufactured. The poles we deliver in the water to the person who buys them.

Thereupon the defendants moved the Court to direct that verdict and judgment be returned and entered in this cause in favor of the defendants. This motion is based upon the following grounds: First, that it has not been established by the plaintiff that the defendants or either of them are [27] common carriers by railroad engaged in the business of common carriers by rail or were at the time involved in the complaint in this action; Second, that it has not been established by the testimony in this case that the defendants or either of them were engaged as common carriers by railroad of interstate commerce at the time the alleged injuries were received; Third, it has not been established that the plaintiff was employed in such capacity at the time of receiving his injuries or in any capacity necessarily incident to the carriage by railroad as a common carrier of interstate commerce.

Thereupon, the Court, after argument by respective counsel for the plaintiff and defendants, withdrew the case from the jury and ordered a judgment of dismissal on the merits; to which the plaintiff excepted and the exception was allowed.

Thereafter and within the time allowed by law, a motion for a new trial was filed and served, on the following grounds:

1. The said order is against law.

2. That said order is without precedent and has no foundation or justification in law or in fact.

3. That said order assumes to decide, and does decide, questions of fact which were exclusively within the providence of the
23 jury.

4. Errors of law occurring at the trial and excepted to at the time by the plaintiff.

Thereafter, on February 21, 1914, the above motion for a new trial was overruled; to which the plaintiff excepted and his exception was allowed. [28]

Order Settling Bill of Exceptions.

The foregoing entitled cause coming on regularly for hearing before the Court on this 1st day of April, 1914, the time duly designated by the Court for settling and certifying the bill of exceptions therein, the plaintiff and defendants appearing by their respective attorneys of record herein, and the parties now agreeing to the settlement of the foregoing as the bill of exceptions in this action;

Now, therefore, it is by the Court and the Judge of said Court presiding at the trial of said cause, ordered and certified that the fore-

going be and the same hereby is settled as the true bill of exceptions in said cause, and that the said bill of exceptions includes all the material facts and evidence herein, except the exhibits introduced in evidence, which are hereby made a part of said bill of exceptions, and the same is hereby approved, allowed and made a part of the record herein, and the same being so settled and certified it is hereby ordered to be filed herein by the Clerk, and the Clerk of this Court is hereby directed to forward the said exhibits in the usual way with the bill of exceptions as a part of the record to the Honorable Circuit Court of Appeals for the Ninth Circuit.

JEREMIAH NETERER,
Judge. [29]

[Indorsed: Filed Mar. 31, 1914.] [30]

24 [Title of Court and Cause.]

Assignment of Error.

Comes now the plaintiff, Gunder Nordgard, and files the following assignment of Error upon which he will reply in his prosecution of his Writ of Error in the above entitled cause, in the United States Circuit Court of Appeals for the Ninth Circuit, for relief from the judgment rendered in said cause dismissing said action.

1. The Honorable District Court erred in granting the motion of the defendants to take the case away from the jury at the close of all the evidence and in dismissing plaintiff's case on the merits.

2. The Honorable District Court erred in overruling plaintiff's motion for a new trial.

Wherefore, plaintiff, plaintiff in error, prays that the Judgment of Dismissal of the Honorable District Court for the Western District of Washington, Northern Division, be reversed and that directions be given that plaintiff may have a new trial of said cause and that full force and efficiency may inure to the plaintiff by reason of his prosecution of said cause.

JOHN T. CASEY,
Plaintiff's Attorney.

[Served March 19, 1914.] [30-*a*]

[Indorsed: Filed Mar. 19, 1914.] [30-*b*]

[Title of Court and Cause.]

Petition for Writ of Error.

[U. S. District Court.]

The plaintiff, Gunder Nordgard, feeling himself aggrieved by the judgment dismissing his action entered in the above entitled cause,

comes now by his attorney and petitions this Honorable
25 Court for an order allowing him to prosecute a writ of error to the Honorable Circuit Court of Appeals of the United States for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided and without the payment of costs in advance or the giving of security for the same as provided in his affidavit heretofore filed herein.

JOHN T. CASEY,
Plaintiff's Attorney.

[Indorsed: Filed Mar. 19, 1914.] [31]

[Title of Court and Cause.]

Order Allowing Writ of Error.

[U. S. District Court.]

Upon motion of John T. Casey, attorney for the above named plaintiff, and upon filing a petition for a Writ of Error and Assignment of Errors as required by law, It Is Hereby

Ordered, that a Writ of Error be and is hereby allowed to have reviewed in the Honorable Circuit Court of Appeals of the United States for the Ninth Circuit the judgment entered herein dismissing plaintiff's action; and it is further ordered, upon the affidavit in Forma Pauperis heretofore filed herein by the plaintiff, that the transcript of the record be prepared and forwarded by the Clerk without the payment by the plaintiff of any costs in advance, and without the filing of a cost bond in his behalf; And it is further ordered that the exhibits filed in the cause be forwarded separately by the Clerk in the usual way, to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

In witness whereof, the above order is granted and allowed, this 19th day of March, 1914.

JEREMIAH NETERER,
Judge. [32]

26 [Indorsed: Filed Mar. 19, 1914.] [33]

[Title of Court and Cause.]

Writ of Error.

[From U. S. Circuit Court of Appeals.]

UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of an action which is in the District Court before

you, or some of you, between Gunder Nordgard, Plaintiff in Error, and the Marysville & Northern Railway Company, a corporation, and Stimson Mill Company, a Corporation, Defendants in Error, a manifest error hath happened to the damage of the said plaintiff in Error, as by his complaint appears, and we being willing that error, if any hath happened should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Circuit Court of Appeals of the United States for the Ninth Circuit, together with this writ so that you have the same at San Francisco, California in said Circuit within thirty days from the date of this writ, in the said Circuit Court of Appeals that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to law — custom of the United States ought to be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 19th day of March, A. D. 1914, to-
27 gether with the seal of said Court.

FRANK L. CROSBY, *Clerk*,
By ED M. LAKIN,
Deputy Clerk of the District Court of the United States for the Western District of Washington, Northern Division. [34]

[Indorsed: Filed Mar. 19, 1914.] [35]

[Title of Court and Cause.]

Citation.

[On Writ of Error from U. S. Circuit Court of Appeals].

THE UNITED STATES OF AMERICA:

The President of the United States of America to the Marysville and Northern Railway Company, a corporation, and Stimson Mill Company, a corporation, Defendants in Error, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit at the Court room of Said Court, in the City of San Francisco, and State of California, within thirty days from the date of this Citation, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein, Gunder Nordgard is Plaintiff in Error, and Marysville and Northern Railway Company, a corporation and Stimson Mill Company a corporation, are Defendants in Error, to show cause if any there be, why the judgment in the said Writ of Error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, and the seal of said Court, this 19th day of March, A. D. 1914.

JEREMIAH NETERER,
Judge of the District Court of the United States for the Western District of Washington, Northern Division.

[Served March 19, 1914.]
[Indorsed: Filed Mar. 19, 1914.] [37]

28 [Title of Court and Cause.]

Præcipe.

[For Transcript of Record upon Writ of Error from U. S. Circuit Court of Appeals].

To the Clerk of the above entitled Court:

You will please make out for a record on Writ of Error herein To The Circuit Court of Appeals, Ninth Circuit: Complaint, Joint Amended Answer, Judgment of Dismissal, Opinion, Bill of Exceptions and Order Settling Bill of Exceptions, Assignment of Errors, Petition for Writ of Error, Order Allowing Writ of Error, Writ of Error and Citation.

JOHN T. CASEY,
Plaintiff's Attorney. [38]

[Indorsed: Filed Mar. 19, 1914.] [39]

[Title of Court and Cause.]

Clerk's Certificate to Transcript of Record.

[Upon Writ of Error from U. S. Circuit Court of Appeals.]

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the 45 typewritten pages, numbered from 1 to 45, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and the same constitute the record on return to said Writ of Error herein from the judgment of said United States District Court for

the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

29 I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation issued in this cause. [40]

I further certify that this record on appeal has been prepared without payment of costs and without filing a cost bond in accordance with Order Allowing Writ of Error on Page 32.

In witness whereof I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District, this 1st day of April, 1914.

[SEAL.]

FRANK L. CROSBY, *Clerk.*
ED M. LAKIN, *Deputy.* [41]

[Title of Court and Cause.]

Writ of Error.

[From U. S. Circuit Court of Appeals.]

UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of an action which is in the District Court before you, or some of you, between Gunder Nordgard, Plaintiff in Error, and the Marysville & Northern Railway Company, a corporation, and Stimson Mill Company, a corporation, Defendants in Error, a manifest error hath happened to the damage of the said Plaintiff in Error, as by his complaint appears, and we being willing that error, if any hath happened should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the

30 same to the Circuit Court of Appeals of the United States for the Ninth Circuit, together with this writ so that you have the same at San Francisco, California in said Circuit within thirty days from the date of this writ, in the said Circuit Court of Appeals, that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to law — custom of the United States ought to be done.

Witness the honorable Edward Douglass White, Chief Justice of the United States this 19 day of March, A. D. 1914, together with the seal of said Court.

[SEAL.]

FRANK L. CROSBY, *Clerk.*
ED M. LAKIN,
Deputy Clerk of the District Court of the United States for the Western District of Washington, Northern Division. [42]

[Indorsed: Filed Mar. 19, 1915.] [43]

[Title of Court and Cause.]

Citation.

[On Writ of Error from U. S. Circuit Court of Appeals.]

THE UNITED STATES OF AMERICA:

The President of the United States of America to the Marysville and Northern Railway Company, a Corporation, and Stimson Mill Company, a Corporation, Defendants in Error, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the Court room of Said Court, in the City of San Francisco, and State of California, within thirty days from the date of this Citation, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein, Gunder Nordgard is Plaintiff in Error, and Marysville and Northern Railway Company, a corporation and Stimson Mill Company, a corporation, are Defendants in Error, to show cause if any there be, why the judgment
31 in the said Writ of Error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, and the seal of said court, this 19 day of March, A. D. 1914.

[SEAL.]

JEREMIAH NETERER,
Judge of the District Court of the United States for the Western District of Washington, Northern Division.

[Served March 19, 1915.] [44]
[Indorsed: Filed March 19, 1914.] [45]

32 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2398.

GUNDER NORDGARD, Plaintiff in Error.
vs.
MARYSVILLE & NORTHERN RAILWAY COMPANY, a Corporation, and STIMSON MILL COMPANY, a Corporation, Defendants in Error.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

33 [Title of Court and Cause.]

Motion [for Order Allowing Plaintiff in Error to Prosecute Writ of Error in Forma Pauperis under Act of June 25, 1910, etc.].

Comes now the above named Plaintiff in Error and moves the court in the above entitled cause for an order allowing him to prosecute his Writ of Error herein, in forma pauperis under the Act of June 25, 1910 (36 Stat. 866) and for an order relaxing Rules 17, 23 and 24 in the above cause accordingly.

This motion is made and based upon the affidavit and statement of the Plaintiff in Error, hereto annexed, and on the records and files herein.

JOHN T. CASEY,
Attorney for Plaintiff in Error.

Service of the above and foregoing motion of Plaintiff in Error asking for an order to prosecute his Writ of Error herein, in forma pauperis, together with his statement and affidavit therefor admitted and copies received this 14th day of April 1914, and we hereby stipulate that said matter may be passed upon by the Court on the 4th day of May 1914, without further notice and without argument in opposition thereto.

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Defendants in Error.

[Title of Court and Cause.]

Affidavit and Statement [in Support of Motion for Order Allowing Plaintiff in Error to Prosecute Writ of Error in Forma Pauperis, etc.].

STATE OF WASHINGTON,
County of King, ss:

34 Gunder Nordgard, being first duly sworn, on oath, deposes and says: That he is a citizen of the United States and the Plaintiff in Error in the above entitled cause. That affiant has no means of prosecuting his Writ of Error herein and has been living on the charity of friends for the past year and more. That because of poverty I am unable to pay the costs of prosecuting the Writ of Error herein and I am unable to give security for the same, and I believe that I am entitled to the redress which I seek in said Writ of Error.

That on the 29th day of July 1912, affiant was badly injured, and his back was broken, near the town of Marysville in Snohomish County, Washington, while in the employ of the Defendants in Error, as a railroad brakeman on a railway line of said Defendants in Error. That said accident occurred through the alleged fault and negligence of the Defendants in Error and without any fault or negligence of Plaintiff in Error, as stated and alleged in Plaintiff's complaint herein, and Plaintiff in Error was, at said time, permanently and wholly disabled for the balance of his life, and at said time Plaintiff in Error alleges that he was working as such brakeman on a common carrier railroad engaged in inter-state and foreign commerce, and which railroad was, at said time, owned and operated by the Defendants in Error.

That an Order was entered in the District Court of the United States for the Western District of Washington, Northern Division, allowing the Plaintiff in Error to prosecute his cause of action herein in forma pauperis, and affiant asks that the foregoing motion be granted allowing him to prosecute his Writ of Error herein in forma pauperis under the said act of June 25, 1910 (36 Stat. 866) and that rules 17, 23 and 24 of the Rules of practice of the above entitled court, in so far as applicable in the above entitled cause be

35 relaxed.

GUNDER NORDGARD.

Subscribed and sworn to before me this 14 day of April 1914.

[SEAL.]

J. T. CASEY,
Notary Public in and for the State of Washington, Residing at Seattle.

[Title of Court and Cause.]

Order Granting Motion for Leave to Prosecute Writ of Error in Forma Pauperis.

On consideration of the Motion of John T. Casey, counsel for the Plaintiff in Error (filed April 18, 1914), for an order allowing the Plaintiff in Error to prosecute his Writ of Error in the above entitled cause in this Court in forma pauperis under the Act of June 25, 1910 (36 Stat. 866), and for an order relaxing Rules 17, 23 and 24 of the Rules of Practice of this Court in so far as applicable in the above entitled cause; and it appearing to the Court that the Plaintiff in Error has filed in this Court a statement in forma pauperis under said Act, and that an order was entered by the trial court allowing the Plaintiff in Error to prosecute the cause there in forma pauperis under said act:

It is hereby ordered that the said motion be, and hereby is granted, and that the Plaintiff in Error be, and he hereby is allowed to prosecute his writ of error in the above entitled cause in this Court in forma pauperis under said Act of June 25, 1910, and that the provisions of Rules 17 of the rules of practice of this Court be, and hereby are relaxed accordingly, and

It is further ordered that the cause *of* Writ of Error herein may be heard and determined on the original certified typewritten Transcript of the Record, with exhibits filed and of record in this Court on said Writ of Error, and that the brief for the Plaintiff in
36 Error need not be printed, but may be filed in typewritten form, and that the provisions of rules 23 and 24 of the rules of practice of this Court be, and hereby are relaxed accordingly.

[Endorsed:] Motion, statement, affidavit & order in forma pauperis. Filed Apr. 18, 1914. F. D. Monckton, Clerk.

At a Stated Term, to wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room thereof, in the City and County of San Francisco, in the State of California, on Monday, the Fourth Day of May, in the Year of Our Lord One Thousand Nine Hundred and Fourteen.

Present:

Honorable William B. Gilbert, Circuit Judge.
Honorable Erskine M. Ross, Circuit Judge.
Honorable Charles E. Wolverton, District Judge.

No. 2398.

GUNDER NORDGARD, Plaintiff in Error,
vs.
MARYSVILLE AND NORTHERN RAILWAY COMPANY and STIMSON MILL COMPANY, Defendants in Error.

Order Granting Motion for Leave to Prosecute Writ of Error in Forma Pauperis.

On consideration of the Motion of John T. Casey, counsel for the Plaintiff in Error (filed April 18, 1914), for an order allowing the plaintiff in error to prosecute his writ of error in the above entitled cause in this court in forma pauperis under the Act of June 25, 1910 (36 Stat. 866), and for an order relaxing Rules 17, 23 and 24 of the Rules of Practice of this Court insofar as applicable in the above-entitled cause; and it appearing to the court that the plaintiff in error has filed in this court a statement in forma
37 pauperis under said Act, and that an order was entered by the trial court allowing the plaintiff in error to prosecute the cause there in forma pauperis under said Act:

It is hereby ordered that the said motion be, and hereby is granted, and that the plaintiff in error be, and he hereby is allowed to prosecute his writ of error in the above-entitled cause in this court in forma pauperis under said Act of June 25, 1910, and that the provisions of Rule 17 of the rules of practice of this Court be, and hereby are relaxed accordingly, and

It is further ordered that the cause on writ of error herein may be heard and determined on the original certified typewritten Transcript of the Record, with exhibits filed and of record in this court on said writ of error, and that the brief for the plaintiff in error need not be printed, but, may be filed in typewritten form, and that the provisions of rules 23 and 24 of the rules of practice of this court be, and hereby are relaxed accordingly.

At a Stated Term, to wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room thereof, in the City and County of San Francisco, in the State of California, on Monday, the Eighteenth Day of May, in the Year of Our Lord One Thousand Nine Hundred and Fourteen.

Present:

Honorable William B. Gilbert, Circuit Judge, Presiding.
Honorable Erskine M. Ross, Circuit Judge.
Honorable Charles E. Wolverton, District Judge.

No. 2398.

GUNDER NORDGARD, Plaintiff in Error,
vs.
MARYVILLE & NORTHERN RAILWAY COMPANY, a Corporation, and STIMSON MILL COMPANY, a Corporation, Defendants in Error.

38 *Order of Submission.*

Pursuant to the stipulation of counsel, this day filed therefor, ordered, above-entitled cause submitted to the Court for consideration and decision on the briefs filed and to be filed, and without oral argument.

At a Stated Term, To wit, the October Term A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room thereof, in the City and County of San Francisco, in the State of California, on Monday, the Ninth Day of November, in the Year of Our Lord One Thousand Nine Hundred and Fourteen.

Present:

Honorable William B. Gilbert, Circuit Judge, Presiding.
Honorable Erskine M. Ross, Circuit Judge.
Honorable Charles E. Wolverton, District Judge.

No. 2398.

GUNDER NORDGARD, Plaintiff in Error,
vs.
MARYSVILLE & NORTHERN RAILWAY COMPANY, a Corporation, and STIMSON MILL COMPANY, a Corporation, Defendants in Error.

Order Directing Filing of Opinion and Dissenting Opinion and Filing and Recording of Judgment.

Ordered, that the typewritten opinion this day rendered by this Court in the above-entitled cause be forthwith filed by the clerk,

and that a judgment be filed and recorded in the minutes of this Court, in said cause in accordance with said opinion.

Further ordered, that the dissenting opinion, this day rendered by the Honorable Erskine M. Ross, United States Circuit Judge, in the above-entitled cause be forthwith filed by the clerk.

39 [Title of Court and Cause.]

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

[*Opinion, U. S. Circuit Court of Appeals.*]

John T. Casey, Esq., for Plaintiff in Error.
Hughes, McMicken, Dovell & Ramsey, for Defendants in Error.

Before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge.

GILBERT, *Circuit Judge*:

In an action in the court below, brought by a brakeman of a railway train of the defendants in error to recover damages for personal injuries under the provisions of the Employers' Liability Act of Congress of 1908, the court below directed a verdict for the defendants, the defendants in error here, on the ground that the defendants were not engaged in interstate or foreign commerce.

The record shows that the defendant The Stimson Mill Company was engaged in the logging and lumber business, and carried logs on The Marysville & Northern Railway Company, its logging road from its own timber lands in the forest to the waters of Puget Sound. It dumped all its logs into those waters. A portion of the logs was thereafter sold to various mills on the Sound, and the remainder was taken to the defendant's mill at Ballard, and there manufactured into lumber. The lumber was piled in the Mill Company's lumber yard. About twenty per cent of it was sold in the local market, and the remainder, on orders thereafter obtained, was shipped to points in other states and countries. A portion of the timber so
40 hauled on the logging road consisted of poles for electric wires.

One Vollans, a dealer in cedar poles and piling, testified that he sold about sixty per cent of his poles in California, and forty per cent locally. He said: "I bought the poles from them (the Mill Company), and they delivered them into the water at Ebey Slough where they were received by me. I paid so much a pole delivered in the water at Ebey Slough. There I took the poles, rafted them, and towed them away." "The contract was so much a thousand delivered into the water at Ebey Slough, including the hauling over the railroad."

The question is whether, under these facts either of the defendants was engaged in interstate commerce over the logging road. The

Supreme Court has defined what is not and what is interstate commerce. In Coe v. Errol, 116 U. S. 517, 525, the Court said of goods in transit:

"There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seem to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or on a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State."

The Court quoted from the opinion in the case of The
41 Daniel Ball, 10 Wall, 557, 565: "Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced," and added:

"But this movement does not begin until the articles have been shipped or started for transportation from one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. * * * Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State."

The language so used in that opinion applies in every particular to the facts in the present case. The poles which were sold to Vollans were not shipped to him from the logging camp, but were sold and delivered to him at tide water. There he took them away and towed them away. The testimony does not disclose to what point he towed them, but we may assume that he towed them to a storing place which answered for his warehouse, where he kept his stock in trade, out of which he sold his poles and piling, and where the poles lay until they were sold to customers. It was not known and could not be determined that any particular poles or particular carload of poles were, while being carried on the defendant's road, on their way to a foreign market. As was said in Coe v. Errol they might be sold or otherwise disposed of within the State "and never put in course of transportation out of the State."

The cases which are cited to sustain the view that these poles were,
while on the defendant's road, in the course of interstate
42 transportation have not in any way modified the principles announced in Coe v. Errol, but, on the contrary, have reaffirmed the same, and in each case there has been quoted the rule of

Mr. Justice Bradley in Coe v. Errol that the test is whether the goods have commenced their final movement for transportation from the State of their origin to that of their destination.

In Texas & N. O. R. R. Co. v. Sabine Tram Co., lumber was ordered manufactured and shipped for export through a port where there was no local trade, and it was there shipped to its final destination by a vessel not designated before arrival. The Court held that a continuous line of shipments through the same port to foreign ports of merchandise in which there is no local trade, shows a continuity of transportation which is not broken by a mere delay in transhipment.

In Louisiana R. R. Comm. v. Texas & Pac. Ry. Co., 229 U. S. 336, the Court, while holding that a shipment intended for export to a foreign country, but shipped to the exporting seaport on local bills of lading was interstate commerce, said:

"The shipments were in the physical custody of the railroad company until arrival at New Orleans and thereafter in the physical custody of the steamships, which issued bills of lading therefor to the shippers of the cargo."

In So. Pac. Terminal Co. v. Int. Com. Comm., 219 U. S. 498, the goods were all destined for export and were shipped on initial bills of lading to a terminal in the same state where they were to be delivered to a carrier for a foreign destination. The Court held, following Coe v. Errol, that goods destined for export are necessarily
43 in interstate, as well as in foreign, commerce, when they actually start in the course of transportation to another State, or are delivered to a carrier for transportation.

In line with these decisions is Ohio R. R. Comm. v. Worthington, 225 U. S. 101. In that case coal was shipped from points in the State of Ohio to "on board" vessels at the Port of Huron, but it was all intended for shipment to some point beyond the state undertermined at the time of shipment, but determined after arrival at Port Huron. The Court said:

"By every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage, intended by the parties to be such."

In all of these cases the goods, from the time of their initial shipment were all on their way to points in another State or country. There might be a pause or delay at a point of transhipment; there might be uncertainity of identity of connecting carriers; there might even be uncertainity as to the precise point of their ultimate destination; but in each case it could be positively affirmed that from the beginning of their transportation they were all in course of transit to points beyond the State in which the original shipment was made.

In the case at bar there was no initial shipment of the goods. The transportation of the poles from the forest in which they were cut to tidewater, where they were sold, was not a shipment. There was no contract of carriage; there was no bill of lading; there was no consignor or consignee. The goods were not committed to a carrier. The defendant Mill Company simply carried over its own road, on

its own cars, its own goods to a market where it sold and delivered them. It had no concern with the subsequent disposition
44 of them. It was under no obligation to deliver them to another carrier, and no other carrier was under obligation to receive them or carry them further. The selling of the poles after the first sale by the Mill Company, or whether they were going outside of the state, depended upon chance or the exigencies of trade. The movement of the poles did not become interstate commerce until by the act of the purchasers thereof the poles were started on their way to their destination in another state or country. The beginning of the transit which constitutes interstate commerce "is defined in Coe v. Errol to be the point of time that an article is committed to a carrier for transportation to the State of its destination, or started on its ultimate passage." General Oil Co. v. Crain, 209 U. S. 211, 229.

We find no error. The judgment is affirmed.

[Endorsed:] Opinion. Filed Nov. 9, 1914. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Title of Court and Cause.]

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

[*Dissenting Opinion, Ross, Circuit Judge.*]

Ross, *Circuit Judge,* dissenting:

This is a personal injury case, and the real question is whether either of the defendants in error was at the time the plaintiff in error received the injuries for which he sued a carrier by railroad engaged in interstate commerce—the action being based upon the Employers' Liability Act of Congress of 1908 (35 Stat. 65). If so, then manifestly the plaintiff in error was likewise so engaged, as he was one of the brakemen of one of the railroad trains of the
45 defendants in error at the time of his injury.

The trial court granted a motion of the defendants for a directed verdict in their favor, which having been returned and a judgment against the plaintiff below entered, he sued out the present writ of error.

The substantial facts appear to be these:

The defendant in error Stimson Mill Company is the owner of a large body of timber land in Snohomish County, State of Washington, which it is engaged in logging, and it also owns and operates a large lumber mill at Ballard, a suburb of the city of Seattle of that State. For the purpose of transporting its logs it caused the defendant in error Marysville & Northern Railway Company to be incorporated, and pays the costs of its operation. That Company was incorporated under the general laws of Washington applicable to railroads, with the incidental power of eminent domain, and

constructed a line of railroad about 16 miles long extending from the vicinity of the logging operations of the mill company to a point on Ebey Slough, one of the mouths of the Snohomish River near the town of Marysville in Snohomish County. The road was connected with the Northern Pacific and Great Northern Railroads, although the only transportation it appears to have done, apart from the specific instances to be mentioned, has been the carrying of the logs of the Stimson Mill Company from its timber lands to Ebey Slough, into which they are dumped, and there a part of them are sold by the Stimson Mill Company to other manufacturers, the remainder being by the Mill Company rafted and towed to Ballard, where they are sawed into lumber by it; and the hauling of the supplies for the Mill Company's logging camp, which the railroad company carries free. It further appears from the evidence that on one occasion some gravel was carried by the railroad to the town of Marysville for street purposes, on which no freight
46 was charged, and that on another occasion a carload of lumber was hauled for a friend of the Mill Company who was starting a logging camp in its vicinity, and for which he was charged only the actual cost of the haul. And the evidence also shows that the Mill Company sold certain poles and piling, cut from its timber lands and hauled by the railroad, to one Vollans, who sold and sent about 60 per cent. of them to various parties in the State of California, which poles and piling were sold by the Mill Company to Vollans, delivered in the waters of Ebey Slough.

It further appears that the cars used on the railroad consist of trucks on which the logs are loaded and made fast at either end by chains, there being two brakemen on each train of cars, each of whom assist in loosening the chains and dumping the logs into the water. It was while engaged in that operation that the plaintiff received the injuries complained of by him.

These further facts are also made to appear: The mill mentioned has a capacity of about 175,000 feet of lumber in ten hours, and manufactures its lumber chiefly from the logs cut from the lands of the Stimson Company, from 20 to 25 per cent. of which is sold in the local market and delivered to the purchasers at the mill, the balance being sold for shipment out of the state of Washington either by water or rail, and delivered on board vessels or cars to the purchaser at Ballard, and billed as directed by the purchaser. When orders are received by the Mill Company for lumber to be shipped by water, the lumber is piled on the dock, from which a steamer takes it, and where sold for shipment by rail the Mill Company loads it on board cars and it is paid for at Ballard by the local agent of the buyer, who directs its destination.

The sole question, as has been said, is whether the defendants in error were at the time in question engaged in interstate com-
47 merce within the meaning of the act of Congress above referred to.

In the case of United States and Interstate Commerce Commission, Appellants, v. Louisiana & Pacific Railway Company, et al., and similar cases, numbered respectively 829, 830, 831, 832, 833, 834,

835, and 836, decided by the Supreme Court May 25, 1914, involving the true character of certain logging roads, that Court said among other things:

"Are they plant facilities merely or common carriers with rights and obligations as such? It is insisted that these roads are not carriers because the most of their traffic is in their own logs and lumber and that only a small part of the traffic carried is the property of others. But this conclusion loses sight of the principle that the extent to which a railroad is in fact used, does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business which is the real criterion determinative of its character. This principle has been frequently recognized in the decision of the courts. We need not cite the many state cases in which it has been so held, in view of the fact that the same principle was laid down in the late case of Union Lime Co. v. Chicago & N. W. Ry. Co., 233 U. S. 211. In that case the Supreme Court of Wisconsin sustained the extension of a spur track to reach the quarries and lime kilns of a single company as a public use authorizing the exercise of the right of eminent domain, and this court affirmed the judgment. Dealing with the contention that the Wisconsin statute was invalid because it authorized action appropriating property upon the exigency of a private business, this court said (p. 221):

"'A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for
48 the products of a particular plant; its cost may be defrayed by those in special need of its service at the time. But none the less, by virtue of the conditions under which it is provided the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service and are subject to the regulation of public authority. As was said by this court in Hairston v. Danville & Western Rwy. Co., supra (208 U. S. 598): "The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost." There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings. See De Camp v. Hibernia R. R. Co., 47 N. J. Law, 43; Chicago, etc. R. R. Co. v. Porter, 43 Minn. 527; Ulmer v. Lime Rock R. R. Co., 98 Me. 579; Railway Company v. Petty, 57 Ark. 359; Dietrich v. Murdock, 42 Mo. 279; Bedford Quarries R. R. Co. v. Chicago, etc. R. R. Co., 175 Ind. 303.'"

Applying the principle there referred to to the facts of the present case, I am of opinion that the railroad company here involved is a common carrier. While the chief purpose of its construction undoubtedly was the transportation of logs cut from the lands of the Stimson Mill Company, it was by virtue of its charter legally bound to carry the logs and other property of the public; and, as the facts

show, did on occasion do so. At what charge, or whether without charge, is unimportant; it was clearly entitled to compensation for such transportation, and to the establishment of proper rates therefor.

The record shows that a part of the business in which the Mill Company was engaged was the cutting and selling of poles
49 and piling from its timber lands. The witness Vollans testified on behalf of the complainant in the case—plaintiff in error here—as follows: "I am a dealer in cedar poles and piling, and in my business have dealt with the Stimson Mill Company and the Marysville & Northern Railway. During the year 1912 they hauled poles and piling for me; I paid them for it. I sell about sixty per cent of them in California, and forty per cent locally. * * * My dealings were entirely with the Stimson Mill Company. I bought the poles from them and they delivered them into the water at Ebey Slough where they were received by me. I paid so much a pole delivered in the water at Ebey Slough. There I took the poles, rafted them and towed them away. This was prior to April, 1912. * * * The contract was so much a thousand delivered in the water at Ebey Slough, including the hauling over the railroad." It will be observed that the witness there distinctly testified that the defendants in error hauled the poles and piling so bought for the purchaser, about sixty per cent of which he sold in California, and that the poles and piling so bought and hauled for compensation duly paid, were delivered to him in the water at Ebey Slough, from which place he towed them away tied together. If knowledge on the part of the defendants in error that a part of such poles and piling were intended for continuous transportation by the purchaser to another State be essential, such knowledge, I think, might well have been found by the jury from the testimony of Vollans.

The opinion of the majority of the Court is based, as it seems to me, upon the assumption that the place in Ebey Slough where the Mill Company dumps all the logs cut from its lands is a sort of gathering place or rendezvous at and from which only it sells its logs, and consequently that the defendants in error are unaffected by anything any purchaser of any part thereof may do with
50 what he purchases: Says the Court in its opinion:

"In the case at bar there was no initial shipment of the goods. The transportation of the poles from the forest in which they were cut to tide-water, where they were sold, was not a shipment. There was no contract of carriage; there was no bill of lading; there was no consignor or consignee. The goods were not committed to a carrier. The defendant Mill Company simply carried over its own road, on its own cars, its own goods to a market where it sold and delivered them. It had no concern with the subsequent disposition of them."

I do not see how that can be properly affirmed in this case in view of the testimony of the witness Vollans. Even if there were any contradiction of his testimony, which, however, the record fails to show, his credibility was a question for the jury, and not for

either the trial court or this court. If true, it seems to me to show that the poles and piling he purchased were cut for him by the Mill Company from its timber lands for the purpose of being, in part, transported to the State of California, first by the railroad owned by the Mill Company, which I think I have shown should be regarded as a common carrier, to the waters of Ebey Slough, into which they were by the contract with Vollans to be dumped, and where he was to receive them for continuous transportation by water to California. Whether by ship or raft is wholly unimportant. Such of the poles and piling as were designed for the California trade did, in my opinion, begin to move from the State of Washington to the State of California when they left the lands of the Mill Company under the contract testified to by Vollans; and if that contract was in fact made and acted on as testified to, the commencement of the movement of such poles and piling constituted, in my opinion, commerce between the two states mentioned, within the decision of Coe v. Errol, 116 U. S. 517, and other decisions
51 of that Court referred to in the opinion of this Court herein.

The principle annunciated in the cases of Louisiana R. R. Comm. v. Tex. & Pac. Ry. Co., 229 U. S. 336; Southern Pac. Terminal Co. v. Int. St. Com. Comm., 219 U. S. 498; Ohio Railroad Comm. v. Worthington, Receiver, 225 U. S. 101, and Texas & N. O. R. R. Co. v. Sabine Tran. Co., 227 U. S. 111, is that "it is the essential character of the commerce, not its mere incidents" which determines its true character, and that it "takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country."

For the reasons above stated I think the judgment should be reversed and the cause remanded to the Court below for a new trial.

[Endorsed:] Dissenting Opinion. Filed Nov. 9, 1914. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2398.

GUNDER NORDGARD, Plaintiff in Error,
vs.
MARYSVILLE & NORTHERN RAILWAY COMPANY, a Corporation, and STIMSON MILL COMPANY, a Corporation, Defendants in Error.

Judgment.

[U. S. Circuit Court of Appeals.]

In Error to the District Court of the United States for the Western District of Washington, Northern Division.

This Cause came on to be heard on the Transcript of
52 the Record from the District Court of the United States for the Western District of Washington, Northern Division, and was duly submitted:

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Said District Court in this cause be, and hereby is affirmed, with costs in favor of the defendants in error and against the plaintiff in error.

It is further ordered and adjudged by this Court that the defendants in error recover against the plaintiff in error for their costs herein expended, and have execution therefor.

[Endorsed:] Judgment. Filed and Entered Nov. 9, 1914. F. D. Monckton, Clerk.

At a Stated Term, To-wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room thereof, in the City of and County of San Francisco, in the State of California, on Monday, the Eighth Day of March, in the Year of our Lord One Thousand Nine Hundred and Fifteen.

Present:

Honorable William B. Gilbert, Circuit Judge, Presiding,
Honorable Erskine M. Ross, Circuit Judge,
Honorable Charles E. Wolverton, District Judge.

No. 2398.

GUNDER NORDGARD, Plaintiff in Error,
vs.
MARYSVILLE & NORTHERN RAILWAY COMPANY, a Corporation, et al., Defendants in Error.

Order Denying Petition for a Rehearing

On consideration thereof, it is ordered that the Petition, filed December 10, 1914, on behalf of the plaintiff in error for
53 a rehearing of the above-entitled cause be, and hereby is denied.

[Title of Court and Cause.]

Petition for Writ of Error [from Supreme Court U. S.].

The Plaintiff in error, Gunder Nordgard, feeling himself aggrieved by the opinion and jujdgment of the Court in the above entitled cause, affirming the dismissal of Plaintiff's action by the District Court, comes now by his attorney, and petitions this Honorable Court for an order allowing him to prosecute a Writ of Error to the Honorable Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided.

JOHN T. CASEY,
Attorney for Plaintiff in Error.

[Endorsed: Filed March 15, 1915.]

[Title of Court and Cause.]

Order Allowing Writ of Error [from Supreme Court U. S.].

Upon motion of John T. Casey, attorney for Gunder Nordgard, the above named Plaintiff in error, and upon filing a petition for a Writ of Error and Assignment of Errors, as required by law, it is hereby;

Ordered, that a Writ of Error be and is hereby allowed to be reviewed in the Honorable Supreme Court of the United States, a judgment rendered and entered herein affirming the judgment of dismissal entered in the District Court of the United States for the Western District of Washington, Northern Division, and that the transcript of the record be prepared and forwarded by the Clerk of this Court without the payment by the Plaintiff in error
54 of costs in advance and without the filing of a Cost Bond in his behalf; and that the clerk of this Court sign, seal and issue said writ of error.

And it is further ordered that the exhibits and record be forwarded in the usual way to the Clerk of the Supreme Court of the United States at Washington, District of Columbia.

In witness whereof, the above order is granted and allowed this 15 day of March, 1915.

WM. B. GILBERT,
Senior U. S. Circuit Judge.

[Endorsed: Filed Mar. 15, 1915.]

[Title of Court and Cause.]

Assignment of Error.

Comes now the above named Plaintiff in error, Gunder Nordgard, and files the following Assignment of Error upon which he will rely in the prosecution of his Writ of Error in the above entitled cause in the Supreme Court of the United States, for relief from the opinion and judgment rendered and entered in the above entitled Court and cause, affirming the dismissal of Plaintiff's action in the District Court of the United States for the Western District of Washington, Northern Division.

1. The Honorable Circuit Court of Appeals erred in affirming the judgment of dismissal rendered and entered in the said District Court of the United States for the Western District of Washington, Northern Division, and in refusing the Plaintiff therein a new trial.

Wherefore, Plaintiff, Plaintiff in error, prays that the said judgment of the United States Circuit Court of Appeals, Ninth
55 Circuit, affirming the said judgment of the said District Court, and also that the judgment of the said District Court of the United States for the Western District of Washington, Northern Division, be reversed, and that directions be given that Plaintiff, Plaintiff in Error, may have a new trial, and a trial on the merits, of said cause and that full force and efficiency may inure to the Plaintiff, Plaintiff in error, by reason of his prosecution of his said cause of action herein.

JOHN T. CASEY,
Attorney for Plaintiff in Error.

[Served March 12, 1915.]

[Endorsed: Filed Mar. 15, 1915.]

[Title of Court and Cause.]

Stipulation.

It is hereby stipulated that the transcript of the record on return to the Writ of Error from the Supreme Court of the United States in the above entitled cause, may consist of a copy of the following:

1. Certified transcript of the record on which said cause was heard, in said Circuit Court of Appeals.
2. Opinion and Dissenting Opinion.
3. Judgment.
4. Petition for Writ of Error returnable in United States Supreme Court.
5. Order allowing said Writ of Error.
6. Assignment of Errors on said Writ of Error.
7. Certificate of Clerk to transcript of record on return to said Writ of Error.
8. This stipulation.

56 9. Original Writ of Error.

10. Original Citation on said Writ of Error.
11. Exhibits.
12. Stipulation and Order substituting administrator.

JOHN T. CASEY,
Counsel for Plaintiff in Error.
HUGHES, McMICKEN, DOVELL & RAMSEY,
Counsel for Defendants in Error.

[Endorsed: Filed Apr. 12, 1915.]

57 [Title of Court and Cause.]

Certificate of Clerk U. S. District Court to Original Exhibits.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that the hereto attached sealed package contains the Original Exhibits introduced and used upon the hearing and trial of the above entitled cause, as follows: Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7 and 8; which said Original Exhibits are herewith transmitted to the Circuit Court of Appeals, there to be inspected and considered together with the transcript of the record on appeal in the above entitled cause; which said exhibits are so transmitted pursuant to the order of the said District Court so directing, a copy of which said order will be found on page 32 of the record on appeal in said above entitled cause.

In testimony whereof I have hereunto set my hand and affixed

my official seal, at Seattle, in said District, this 1st day of April, 1914.

FRANK L. CROSBY, *Clerk,*
(Signed) By EDM. LAKIN, *Deputy.*

Endorsed: Filed Apr. 12, 1915.

58 [Title of Court and Cause.]

Motion and Stipulation for Substitution of Party Plaintiff in Error.

Comes now the Plaintiff in Error above named, and by his attorney John T. Casey, moves the Court for an Order substituting P. J. McCluskey as administrator, for and in place of the above named Gunder Nordgard, Plaintiff in Error, for the reasons and upon the grounds, that said Gunder Nordgard died on the 28th day of February 1915 and while the above cause was pending in this court.

This motion is made and based upon the records and files herein, and upon the stipulation heretofore made between the above named parties in the above cause, and will be passed upon by the Court on May 3, 1915.

(Signed) JOHN T. CASEY,
Attorney for Plaintiff in Error.

[Served Apr. 24, 1915.]

[Title of Court and Cause.]

Stipulation.

It is hereby stipulated and agreed by and between the above named parties, through their attorneys of record, that, whereas:

The above named Gunder Nordgard, Plaintiff in Error, having died while the above cause was pending in the above entitled court, to-wit: On the 28th day of February, 1915, and P. J. McCluskey, having been regularly appointed administrator of the estate of said Gunder Nordgard on the 23rd day of March, 1915, by the Superior Court of the State of Washington for King County, the Court having jurisdiction in such matters;

Now therefore, it is hereby further stipulated and agreed
59 that said P. J. McCluskey, as administrator may be substituted for Plaintiff in Error in the above cause and that an order may be entered in the above cause to that effect, and that the title of the case may be changed accordingly in said order and in all further papers and proceedings herein.

(Signed) JOHN T. CASEY,
Counsel for Plaintiff in Error.

(Signed) HUGHES, McMICKEN, DOVELL & RAMSEY,
Counsel for Defendants in Error.

[Served Apr. 24, 1915.]

[Endorsed: Filed Apr. 27, 1915.]

60 United States Circuit Court of Appeals for the Ninth Circuit.

At a Stated Term, to wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-room thereof, in the City and County of San Francisco, in the State of California, on Monday, the Third Day of May, in the Year of Our Lord One Thousand Nine Hundred and Fifteen.

Present:

The Honorable William B. Gilbert, Circuit Judge, Presiding.
Honorable Erskine M. Ross, Circuit Judge.
Honorable William W. Morrow, Circuit Judge.

No. 2398.

GUNDER NORDGARD, Plaintiff in Error,
vs.
MARYSVILLE & NORTHERN RAILWAY Co., a Corporation, et al., Defendants in Error.

Order Denying Motion for Substitution of Party Plaintiff in Error.

On consideration of the motion of Mr. John T. Casey, counsel for the plaintiff in error, filed April 27, 1915, for an order substituting P. J. McCluskey, as Administrator of the Estate of Gunder Nordgard, Deceased, as Plaintiff in Error in the above-entitled cause in the place and stead of said Gunder Nordgard, Deceased, and it appearing to the court that a writ of error returnable in the Supreme Court of the United States was allowed and issued in the said cause on the 15th day of March, A. D. 1915, divesting this court of jurisdiction at this time to make the order of substitution applied for:

Therefore, it is ordered that the said motion be, and hereby is denied.

61 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2398.

GUNDER NORDGARD, Plaintiff in Error,
vs.
MARYSVILLE & NORTHERN RAILWAY COMPANY, a Corporation, and STIMSON MILL COMPANY, a Corporation, Defendants in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record on Return to Writ of Error from Supreme Court U. S.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty (60) pages, numbered from and including 1 to and including

60, to be a true copy of the complete record, made pursuant to the stipulation of counsel for the respective parties, filed on the 12th day of April, A. D. 1915, under Rule 8 of the Supreme Court of the United States, in the above-entitled case, including the Assignment of Errors filed on the writ of error from said Supreme Court, and of all proceedings had, and of all papers, including the opinion and dissenting opinion, filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same, together with the accompanying original exhibits, viz: Plaintiff's Nos. 1, 2, 3, 4, 5, 6, 7 and 8, constitute the Transcript of Record, on return to the annexed writ of error from the Supreme Court of the United States in the above-entitled cause, as made and certified pursuant to the said stipulation.

Attest my hand and Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this fifth day of May, A. D. 1915.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*,
By MEREDITH SAWYER,
Deputy Clerk.

[United States internal revenue documentary stamp, series of 1914, ten cents, cancelled May 5, 1915. F. D. M., by M. S.]

62 In the United States Circuit Court of Appeals, Ninth Circuit.

No. 2398.

GUNDER NORDGARD, Plaintiff in Error,
vs.
MARYSVILLE AND NORTHERN RAILWAY COMPANY et al., Defendants in Error.

Writ of Error.

UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in the above entitled cause affirming the judgment of the District Court of the United States for the Western District of Washington, Northern Division, before you, or some of you, in an action wherein Gunder Nordgard is Plaintiff in error and Marysville and Northern Railway Company, are defendants in error, manifest error hath happened to the damage of the said Plaintiff in error as by his complaint in the said District Court and his Petition and

Assignment of Errors appears, *and* we being willing that error, if any hath happened, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, under your seal, distinctly and openly, that you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this Writ so that you have the same in the said Supreme Court of the United States at Washington City, District of Columbia, within the time allowed by law, after the date of this Writ, that the record
63 and proceedings aforesaid, being inspected, said Supreme Court of the United States may cause further to be done therein to correct said error which of right and according to law and the custom of the United States ought to be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States this 15th day of March, A. D. 1915, together with the seal of said Circuit Court of Appeals.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals, Ninth Circuit.

Allowed by

WM. B. GILBERT,
Senior U. S. Circuit Judge.

[Endorsed:] Docketed. No. 2398. (Original.) In the U. S. Circuit Court of Appeals, Ninth Circuit. Gunder Nordgard, Plaintiff in Error, vs. Marysville & Northern Ry. Co. et al., Defendants in Error. Writ of Error. Original. Due service of the enclosed writ of error admitted and a true copy received this 19 day of March, 1915. Hughes, McM., D. & R., Attorney- for Defendant in Error. Filed Mar. 23, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. John T. Casey, Attorney for Plaintiff in Error, Suite 440 New York Block, Phone Main 3328, Seattle, Washington.

64 *Return to Writ of Error.*

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit to the within Writ of Error.

As within we are commanded, we certify under the Seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme

Court of the United States, within mentioned, at the day and place within contained.

By the Court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit,
By MEREDITH SAWYER,
Deputy Clerk.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled May 5, 1915. F. D. M., by M. S.]

65 In the United States Circuit Court of Appeals, Ninth Circuit.

No. 2398.

GUNDER NORDGARD, Plaintiff in Error,
vs.
MARYSVILLE AND NORTHERN RAILWAY COMPANY et al., Defendants in Error.

Citation.

THE UNITED STATES OF AMERICA:

The President of the United States of America to the Marysville and Northern Railway Company et al., Defendants in Error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at the Court Room of said Court in the City of Washington, District of Columbia within Sixty (60) days from the date of this citation, pursuant to a Writ of Error filed in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein Gunder Nordgard is Plaintiff, Plaintiff in error, and Marysville & Northern Railway Company et al., are defendants, defendant- in error, to show cause if any there be why the opinion and judgment in the said Circuit Court of Appeals, affirming the judgment of dismissal in the said District Court, and also the judgment in the said District Court of the United States for the Western District of Washington, Northern Division, dismissing Plaintiff's action without a trial on the merits, should not be corrected and speedy justice done to the parties in that behalf.

66 Witness the Honorable Edward Douglass White, Chief Justice of the United States and the seal of said Court this 22nd day of March, A. D. 1915.

WM. B. GILBERT,
One of the Judges of the U. S. Circuit Court of Appeals, Ninth Circuit.

67 [Endorsed:] Docketed. No. 2398. (Original.) In the U. S. Circuit Court of Appeals, Ninth Circuit. Gunder Nordgard, Plaintiff in Error, vs. Marysville & Northern Ry. Co. et al., Defendants in Error. Citation. Due service of the enclosed citation admitted and a true copy received this 23 day of March, 1915. Hughes, McMicken, Dovell & Ramsey, Attorneys for Defendants in Error. Filed Mar. 30, 1915. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit, by Meredith Sawyer, Deputy Clerk. John T. Casey, Attorney for Plaintiff in Error, Suite 440 New York Block, Phone Main 3328, Seattle, Washington.

68 In the Supreme Court of the United States.

No. 1053.

GUNDER NORDGARD, by P. J. McCLUSKEY, as Administrator, Plaintiff in Error,

vs.

MARYSVILLE & NORTHERN RAILWAY COMPANY and STIMSON MILL COMPANY, Defendants in Error.

Statement.

Comes now the Plaintiff in Error, and makes and files the following statement of errors, on which he intends to rely, and hereby designates the parts of the records to be printed, (in case his motion in forma pauperis is not allowed), by the Clerk of the above entitled Court:

I.

Plaintiff in error states that the error on which he intends to rely is the dismissal of his cause of action by the trial Court, without allowing the jury to pass upon the questions of fact raised by the pleadings and the evidence submitted at the trial, and the denial of his motion for a new trial.

II.

The affirmance of the judgment of the trial Court by the Circuit Court of Appeals.

III.

Plaintiff in Error believes the only parts of the record necessary to be printed, for the consideration of this case, are, 1, Complaint, 2, Amended Answer, 3, Judgment of Dismissal, 4, Bill of Exceptions, 5, Judgment of Affirmance.

GEORGE F. HANNAN,
JOHN T. CASEY,
Attorney- for Plaintiff in Error.

69 Due service of the within Statement admitted and Copy Received this 7th day of September, 1915.

E. C. HUGHES,
HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Defendant in Error.

[Endorsed:] No. 1053. In the Supreme Court of the United States. 514–15/24797. Gunder Nordgard, by P. J. McCluskey, as Administrator, Plaintiff in Error, vs. Marysville & Northern Railway Company, and Stimson Mill Company, Defendants in Error. Statement. John T. Casey, Attorney for Plaintiff in Error, 736-7-8 New York Block, Seattle, Washington.

70 [Endorsed:] File No. 24,797. Supreme Court U. S., October term, 1915. Term No. 514. Gunder Nordgard, etc., Pl'ff in Error, vs. Ma-ysville & Northern Railway Company et al. Statement of errors and designation by plaintiff in error of parts of record to be printed. Filed September 13, 1915.

Endorsed on cover: File No. 24,797. U. S. Circuit Court Appeals, 9th Circuit. Term No. 514. Gunder Nordgard, plaintiff in error, vs. Marysville & Northern Railway Company and Stimson Mill Company. Filed June 15th, 1915. File No. 24,797.

SUPREME COURT, U. S.
FILED
JUN 15 1915
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. [redacted]166

GUNDER NORDGARD, PLAINTIFF IN ERROR,

vs.

MARYSVILLE AND NORTHERN RAILWAY COMPANY ET AL.

MOTION OF P. J. McCLUSKEY, ADMINISTRATOR OF THE ESTATE OF GUNDER NORDGARD, DECEASED, TO BE MADE A PARTY PLAINTIFF IN ERROR, AND FOR LEAVE TO PROCEED IN FORMA PAUPERIS, AND PROOF OF SERVICE OF SAME.

GEORGE F. HAMAN,
JOHN T. CASEY,
Attorneys for Plaintiff in Error.

(24,797)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 514.

GUNDER NORDGARD, PLAINTIFF IN ERROR,

vs.

MARYSVILLE & NORTHERN RAILWAY COMPANY AND STIMSON MILL COMPANY, DEFENDANTS IN ERROR.

MOTION.

Comes now P. J. McCluskey, administrator of the estate of Gunder Nordgard, the plaintiff in error in the above-entitled cause, and moves the court for an order allowing him to prosecute the writ of error herein, *in forma pauperis*, under the act of June 25th, 1910 (36 Stat., 866), and for an order relaxing the rules of this court in so far as the same require the payment of fees and the printing of the record herein.

This motion is made and based upon the affidavit and statement heretofore filed herein and on the records and files herein.

GEORGE F. HAMAN,
JOHN T. CASEY,
Attorneys for Plaintiff in Error.

[Endorsed:] No. —. (Original.) In the U. S. Supreme Court. Gunder Nordgard, plaintiff in error, *vs.* Marysville & Northern Railway Company and Stimson Mill Company, defendants in error. Due service of the enclosed motion admitted and a true copy received this 10th day of June, 1915. Hughes, McMecken, Dovell & Ramsey, attorneys for defendants in error. Motion. George F. Haman and John T. Casey, attorneys for plaintiff in error, Suite 440, New York Block, phone Main 3328, Seattle, Washington.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 514.

GUNDER NORDGARD, *Plaintiff in Error,*

vs.

MARYSVILLE & NORTHERN RAILWAY COMPANY and STIMSON LOGGING COMPANY, *Defendants in Error.*

MOTION.

Comes now, P. J. McCluskey, administrator of the estate of the above-named plaintiff in error, and moves the court in the above-entitled cause for an order substituting him as plaintiff in error, and allowing him to prosecute a writ of error herein, *in forma pauperis,* under the act of June 25, 1910 (36 Stat., 866), and for an order relaxing the rules of this court in so far as the same require the payment of fees and the printing of the record herein.

This motion is made and based upon the affidavit and statement hereto attached and on the records and files herein.

JOHN T. CASEY,
Attorney for Plaintiff in Error.

Service of the above and foregoing motion of P. J. McCluskey to be substituted as plaintiff in error in the above cause and asking for an order to prosecute a writ of error herein *in forma pauperis,* together with his statement and affidavit therefor, admitted and copies received this 11th day of May, 1915, and it is hereby stipulated that said matter may be passed upon and granted by the court without further notice and without argument in opposition thereto.

E. C. HUGHES,
Attorney for Defendant in Error.

HUGHES, McMECKEN,
DOVELL & RAMSEY,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 514.

GUNDER NORDGARD, *Plaintiff in Error,*

vs.

MARYSVILLE & NORTHERN RAILWAY COMPANY and STIMSON MILL COMPANY, *Defendants in Error.*

AFFIDAVIT AND STATEMENT.

UNITED STATES OF AMERICA,
State of Washington, County of King, ss:

P. J. McCluskey, being first duly sworn, on oath deposes and says: that he is a citizen of the United States and on the 23d day of March, 1915, affiant was appointed administrator of the estate of Gunder Nordgard, deceased, the above-named plaintiff in error, by the Superior Court of the State of Washington for King County, the court having jurisdiction in the matter; that said Gunder Nordgard was also a citizen of the United States; that affiant is a creditor of said Gunder Nordgard, and that the said Gunder Nordgard was indebted to affiant and other persons in large sums and amounts for his care and keeping from the time he was injured on the 29th day of July, 1912, until the time of his death, on February 28, 1915; that on said 29th day of July, 1912, said Gunder Nordgard was badly injured and his back was broken, and thereafter he was helpless until the time of his death and was constantly in the hospital and in the care of physicians and surgeons; that said accident occurred through the negligence of the defendants in error and without any negligence on the part of the plaintiff in error, as stated and alleged in his complaint, which is a part of the

record herein and which is hereby referred to and made a part of this affidavit; that said Gunder Nordgard was injured while acting as a brakeman on the railroad of the defendants in error and while he was unloading logs from the cars of the defendants in error; that defendants own and operate a common-carrier railroad engaged in interstate and foreign commerce, and said Gunder Nordgard was employed by said defendants in error in such commerce at the time of his injuries.

That an order was entered in the District Court of the United States for the Western District of Washington, Northern Division, allowing the plaintiff to prosecute his cause of action *in forma pauperis*, and affiant asks that the foregoing motion be granted, allowing affiant, as administrator of the estate of said Gunder Nordgard, deceased, to prosecute this writ of error as plaintiff in error, for the benefit of his estate and his father, who is old and helpless and without means, and for the benefit of his creditors, under the act of June 25, 1910 (36 Stat., 866), and that the rules of practice of the above-entitled court, in so far as applicable to the payment of costs and the printing of the record in the above-entitled cause, be relaxed accordingly.

P. J. McCLUSKEY.

Subscribed and sworn to before me this 14th day of May, 1915.

[SEAL.] J. T. CASEY,
Notary Public for State of Washington,
Residing at Seattle, Washington.

[Endorsed:] No. —. (Original.) In the Supreme Court of the United States. P. J. McCluskey, administrator for Gunder Nordgard, deceased, plaintiff in error, *vs.* Marysville & Northern Railway Co. *et al.*, defendants in error. Motion, statement, and order *in forma pauperis*. John T.

Casey, attorney for plaintiff in error, suite 440 New York Block, phone Main 3328, Seattle, Washington.

[Endorsed:] File No. 24,797. Supreme Court U. S., October term, 1915. Term No. 514. Gunder Nordgard, pl'ff in error, *vs.* Marysville & Northern Railway Company *et al.* Motion of P. J. McCluskey, administrator of the estate of Gunder Nordgard, deceased, to be made the party plaintiff in error, and for leave to proceed *in forma pauperis*, and proof of service of same. Filed June 15, 1915.

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In the Supreme Court of the United States

P. J. McCLUSKEY AS ADMINISTRATOR OF THE ESTATE OF GUNDER NORDGARD, Deceased,
Plaintiff in Error,
vs.
MARYSVILLE & NORTHERN RY. CO., and STIMSON MILL CO,
Defendants in Error.
No. 166.

UPON WRIT OF ERROR FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a Writ of Error, prosecuted by P. J. McCluskey as the personal representative of Gunder Nordgard, deceased, who brought this action originally to recover damages for personal injuries received while employed by defendants in error as a railroad brakeman in the State of Washington, and who since died from his injuries.

The Complaint, (Transcript 2-4) alleges a cause of action in negligence under the Employers' Liability Act of April 22, 1908.

The Amended Answer (Tr. 4-6) admits many allegations of the Complaint, but denies defendants owned a common carrier railroad or that they were engaged in interstate commerce. It is also contended the accident comes under an Act of the State, not under the Federal Act.

THE EVIDENCE.

The Evidence (Tr. 10-16), shows that the Stimson Mill Company owns the Defendant Railway Company; that defendants' railroad, was granted the privileges of a common carrier. That defendants were engaged at the upper end of the railroad, in logging operations where they gathered their logs and poles, and brought them down to Bryant by a Switch Engine. Here Nordgard was employed as brakeman to assist in hauling them over the railroad, 16 miles, to the town of Marysville, where they were thrown into Puget Sound. About one-third of the logs were there sold by defendants, and the balance taken to their mill at Ballard and manufactured into lumber and shingles, where 20 to 25 per cent. was disposed of locally and the balance sold for shipment out of the State.

The telegraph poles and piling were sold to one Vollans, hauled over defendants' railroad, and dumped into the water, where he received them—60 per cent. of which, he sent direct to California.

At the close of all the evidence, the District Court dismissed the case on its merits, on the ground there was no proof that defendants were engaged in interstate commerce.

The case was taken by Writ of Error to the Circuit Court of Appeals where the judgment of the trial Court was affirmed; Ross, C. J. dissenting.

QUESTIONS INVOLVED.

The questions involved in this Writ of Error are:

First: Was defendants' railroad a common carrier?

Second: Were they using it, and employing Plaintiff, in interstate commerce at the time he was injured?

Third: Did Plaintiff have a right to a jury trail?

Fourth: What Act applies, State or Federal?

Negligence, and kindred questions, are not involved.

ASSIGNMENT OF ERRORS.

I.

The Honorable Circuit Court of Appeals erred in affirming the action of the District Court in dismissing the case, and denying Plaintiff a jury trial on the issues raised in the pleadings, and presented in evidence.

ARGUMENT AND AUTHORITIES—COMMON CARRIER.

First: Was defendants' railroad a common carrier?

The District Court held it was. The Circuit Court of Appeals assumed it was, and in the dissenting opinion, that conclusion is definitely reached. The question has been raised however, and we deem it advisable to briefly discuss it.

Paragraph II of the Articles of Incorporation, of the Stimson Mill Company, (Exhibit 7), authorizes it:

"To construct and operate, railroads, build flumes or canals; to build, buy, own and operate, steamboats, sailing vessels and other water crafts; and to purchase, hold, mortgage, sell, convey and lease real and personal property."

The charter of the Marysville & Northern Ry. Co.:

"To acquire by purchase, appropriation, condemnation, or by the exercise of the right of EMINENT DOMAIN, all necessary rights-of-way and grounds for depots, tracks and terminals of said railroad line, or any of its side-tracks, switches, extensions or connections."

"FIFTH: To engage in the general railroad business as *a common carrier*, and to carry on and conduct an express company business, and to charge and collect tolls, fares, and freight for the transportation of passengers and any and all kinds of personal property of whatsoever description, *and to have and enjoy all the rights, franchises and privileges of common carriers.*"

In *Winona Ry. v. Blake*, 94 U. S. 179; 24 L. Ed. 99, a similar case, this Court said:

"By its CHARTER, the Winona and St. Peter Railroad Co., was INCORPORATED as a common carrier, with all the rights and *subject to all the obligations that name implies.*"

Section 13 of the Washington State Constitution, among other things provides:

"All railroad, canal, and other transportation companies are declared to be *common carriers*, and subject to legislative control."

In *State v. Superior Court*, 62 Wash. 612, the State Supreme Court held:

"The power of eminent domain is not conferred for private purposes by Rem. & Bal. Code 7106-7109."

In the opinion at Page 615, it is said:

"Every person desiring to ship timber products over such road may require the corporation to carry such timber products under exactly the same conditions. *This is certainly a public service*, and we are not able to see that it is any less a public service because the corporation is a common carrier of a particular class of property. Every public service corporation is engaged in a business which is more or less limited in character. The fact that such business is so limited does not change its character, so far as the right of the public to command the service of the corporation in its particular business is concerned. An express company is generally a common carrier of a particular class of property. A street or interurban railway company may be a common carrier of passengers only. No one would contend that such companies are not public service corporations because of the *limited* character of their business."

See also, *State v. Superior Court*, 47 Wash., 397-401; 92 Pac. 269; *State v. Superior Court*, 48 Wash. 277; *State v. Superior Court*, 56 Wash. 214.

In *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, as in many other cases, this Court held that Federal Courts are bound by decisions of State Courts in the construction of State Constitutions and Statutes.

The only qualification in the Act of April 22, 1908, is that the roads *are* common carriers. Defendants' railroad was so organized. It claims

and receives from the State, the power of Eminent Domain, and other privileges, and must assume the responsibilities and liabilities attached thereto.

An expressman or other public carrier on the street is a common carrier by virtue of his vocation, these logging railroads are common carriers by virtue of the laws of their creation, and the ordinary definition of the first does not apply to the second.

The defendants in error, having admitted their Articles, granting them the powers and privileges of common carriers under the laws of the State, are in no position to dispute the question. It must be admitted.

See also, *United States v. Union Stock Yard Co.*, 226 U. S. 286; 57 L. Ed. 226. Also, *United States v. La. Ry.*, 234 U. S. 1; 58 L. Ed. 1185, involving "Tap Line" railroads, identical in every particular with defendants' railroad in the instant case, and puts the "Common Carrier" question at rest.

INTERSTATE COMMERCE.

SECOND: Were defendants using their railroad and plaintiff's services, in interstate commerce at the time he was injured?

Among other things it is admitted by defendants in error, as a part of the facts:

"That of the logs, timbers and poles hauled by the defendant railway company over its road for the defendant mill company in July, 1912, and unloaded into Ebey Slough as aforesaid, about one-third were sold and delivered to the purchasers at said point, and the balance were towed to the saw mill of the Stimson Mill Company at Ballard, Washington, and there cut and prepared for market * * *. That the lumber products so manufactured out of said logs, timbers, etc., by the Stimson Mill Company were during the month of July, 1912, and ever since have been disposed of by it as follows: About twenty to twenty-five per cent, sold for use in the local market and delivered to the purchaser at the mill; the balance sold for shipment out of the state, either by water or rail, and delivered on board vessels or cars to the purchaser at Ballard, Washington, billed as directed by the purchaser: * * * ." (Tr. 10-11.)

Plaintiff *inter alia*, testified:

"On the 29th day of July, 1912, I was working at Bryant, braking on the Marysville & Northern railroad for the defendants in this case. At the time I was injured I was at Marysville unloading logs * * *. *We also hauled some poles for a pole man in Everett.* * * * I don't know how often, but perhaps a couple or three times a week; there were generally two or three cars at a time. The accident occurred at the terminus of the railroad near the town of Marysville, where the logs are dumped from the cars into Ebey Slough, an arm of the Snohomish River, where the tide ebbs and flows. The chains holding the logs on the cars were fastened on the water side; they could have been

as efficiently fastened on the other side, and there would not have been the same degree of danger. * * * This railroad is connected with the Northern Pacific at Bryant. This railroad is connected with Copp & Haley's logging road, which is connected with the Great Northern at Marysville. During all three of the summers I spent working there, I had been doing the same work. I was occasionally at the camp at Bryant; my regular work was from Bryant down to the river. The logs are cut in the camp and brought down by the switch engine to Bryant. The camp is just above Bryant. Then from Bryant, this engine and train crew took the car load of logs in a train and hauled them down from Bryant and dumped them into the water of Ebey Slough, just below Marysville. It was my work to collect cars, get them at Bryant and then come down and unload them at Ebey Slough." (Tr. 11-12.)

B. H. Vollans, *inter alia*, testified:

"I am a dealer in cedar poles and piling and in my business have dealt with the Stimson Mill Company and the Marysville & Northern Railway Company. During the year 1912, they *hauled* poles and piling for me; I paid them for it. *I sell about sixty per cent. of them in California* and forty per cent. locally. * * * The contract was so much a thousand delivered in the water at Ebey Slough, including the hauling over the railroad." * * * (Tr. 13.)

J. F. Ives, on behalf of defendants, *inter alia*, testified:

"I am Vice-President of the Stimson Mill Company, and also of the Marysville & Northern Railway Company. The railroad of the Marysville &

Northern runs from a crossing with the Northern Pacific at Bryant down to Marysville. It is owned by the Stimson Mill Company, which also owns timber lands above Bryant. * * * The railway is simply a subsidiary concern of the Stimson Mill Company. * * * We have an agent in San Francisco who sells lumber on commission. * * * He sells it *before* he places the order. For the last five years we have not sent over five million feet a year to him. Some of that we take out of the woods in Snohomish County. Five or ten million feet of lumber a year is taken out of the woods in Snohomish County down over this railroad, *then* hauled by tugs to the mill at Ballard, *then* cut up and sent to eastern states." (Tr. 13-15.)

The foregoing testimony shows conclusively that defendants were engaged in interstate commerce.

The commodities transported over the railroad by defendants in error, may be divided into two classes.

First: Poles and piling sold and delivered to Vollans.

Second: Saw logs from which lumber was manufactured.

For convenience, we shall consider these commodities separately.

POLES.

Was the transportation of the poles and piling over defendants' railroad, interstate commerce? The opinion of Justice Ross, is a most convincing argument on the affirmative of this proposition. It is based largely on the Tap Line cases, *U. S. v. Ry.*, 234 U. S. 1, *supra*, and seems unanswerable. As supplementary, we desire to submit some additional reasons deduced from the evidence. In the consideration of this appeal, Plaintiff in Error is entitled to the benefit of all favorable conclusions arising either directly from the evidence or by reasonable inference therefrom. This shows that Nordgard had been employed at the same work about three years. It is reasonable to say Vollans had an established business as dealer in poles and piling during that time, and had purchased poles from Defendants in Error, delivered in Ebey Slough. The payment by him included two elements; cost of the poles, and freight over the railroad. The testimony then shows he took the poles, "rafted them and towed them away." Vollan's testimony that he sent 60 per cent. of the poles to California, is not denied, and as Justice Ross says: "Whether sent by ship or raft is wholly unimportant."

"Was the transit interstate commerce? We agree with Counsel that it is unimportant in determining an answer whether the transit was by water or by railroad, or both water and railroad."

Diamond Match Co. v. Ontonagon, 188 U. S. 92.

The majority opinion is based on *Coe v. Errol*, 116 U. S. 517, and makes no mention of the Tap Line cases, which Justice Ross finds so much in point.

Justice Gilbert draws unfavorable inferences and says:

"The testimony does not disclose to what point Vollans towed them, *but we may assume* that he towed them to a storing place which answered for his warehouse where he kept his stock in trade, out of which he sold his poles and piling and where the poles lay until sold to customers."

In appeals from non-suits an Appellate Court should not make unfavorable assumptions of fact. The question is not what deductions can be drawn to make the transportation of the poles local, but what inferences might the Jury fairly draw to justify a finding that the transportation was *interstate.*

"On motion for directed verdict, the Court must take the view of the evidence most favorable to the adverse party."

Southern Ry. v. Cadd, 207 Fed. 277.

"It is sometimes the duty of the judge to direct the verdict for one party or the other, but he has no power to do so where the testimony is oral and conflicting, or where, although the facts are not directly disputed, it is uncertain what inferences should be drawn from them. Inferences of fact are themselves facts, and ordinarily the Jury must draw them and not the Judge."

McLaughlin v. Horne Co., 206 Fed. 246.

That Vollans sent 60 per cent. of the poles by boat, or train, or securely lashed together in a raft, and towed them to his market in California, which he had established by three years dealing, is the irresistable inference which the testimony suggests.

After quoting Vollan's testimony, (Tr. 34) Justice Ross says:

"It will be observed that the witness there distinctly testified, that the defendants in error hauled the poles and piling, so bought, for the purchaser, about sixty per cent. of which he sold in California, and that the poles and piling so bought and hauled for compensation duly paid, were delivered to him in the water at Ebey Slough, from which place he towed them away tied together. If knowledge on the part of the defendants in error that a part of such poles and piling were intended for continuous transportation by the purchaser to another State *be essential*, such knowledge, I think, might well have been found by the jury from the testimony of Vollans.

"The opinion of the majority of the Court is based, as it seems to me, upon the assumption that the place in Ebey Slough where the Mill Company dumps all the logs cut from its land is a sort of gathering place or rendezvous at and from which only it sells its logs, and consequently that the defendants in error are unaffected by anything any purchaser of any part thereof may do with what he purchases: Says the Court in its opinion:

" 'In the case at bar there was no initial shipment of the goods. The transportation of the poles from the forest in which they were cut to tidewater, where they were sold, was not a shipment. There was no contract of carriage; there was no bill of lading; there was no consignor or consignee. The goods were not committed to a carrier. The defendant Mill Company simply carried over its own road, on its own cars, its own goods to a market where it sold and delivered them. It had no concern with the subsequent disposition of them.'

"I do not see how that can be properly affirmed in this case in view of the testimony of the witness Vollans. Even if there were any contradiction of his testimony, which, however, the record fails to show, his credibility was a question for the jury, and not for either the trial court or this court. If true, it seems to me to show that the poles and piling he purchased were cut for him by the Mill Company from its timber lands for the purpose of being, in part, transported to the State of California, first by the railroad owned by the Mill Company, which I think I have shown should be regarded as a common carrier, to the waters of Ebey Slough, into which they were by the contract with Vollans to be dumped, and where he was to receive them for continuous transportation by water to California. *Whether by ship or raft is wholly unimportant.* Such of the poles and piling as

were designed for the California trade did, in my opinion, begin to move from the State of Washington to the State of California when they left the lands of the Mill Company under the contract testified to by Vollans; and if that contract was in fact made and acted on as testified to, the commencement of the movement of such poles and piling constituted, in my opinion, commerce between the two states mentioned, within the decision of *Coe v. Errol*, 116 U. S. 517, and other decisions of that Court referred to in the opinion of this Court herein. The principle annunciated in the cases of *Louisiana R. R. Comm. v. Tex. & Pac. Ry. Co.*, 229 U. S. 336; *Southern Pac. Terminal Co. v. Int. St. Com. Comm.*, 219 U. S. 498; *Ohio Railroad Comm. v. Worthington*, 225 U. S. 101, *and Texas & N. Co. v. Sabine Tram. Co.*, 227 U. S. 111, is that 'it is the essential character of the commerce, not its mere incidents' which determines its true character, and that it 'takes character as interstate or foreign commerce when it is actually started in the course of transportation to another state or to a foreign country.'"

Judge Gilbert says, the poles were "not shipped" to Vollans.

Their arrangements however, could make no difference with the *transportation act* itself. If it did, such arrangements could always be made to defeat the law, and the purpose of the law. The carriage of the poles, and Plaintiff's labor in that transportation, was the same act, whether there was a bill of lading or not. Whether shipped or just delivered they went over defendants' railroad

on their way to California. That satisfies the Liability Law and should satisfy the Court. In floating logs from one state to another on a river, there is no consignor or consignee, bill of lading, etc., yet it is interstate commerce.

In *Duluth Co. v. N. P. Ry.*, 140 N. W. 1105, the Court says:

> "Between the point of delivery of freight for transportation and the point for discharging thereof, there may be changes of ownership, changes of consignee, successive bills of lading, or no bill of lading at all for some section of the transit, and the subject of the carriage be, yet, that of *Interstate commerce from beginning to end.*"

In the instant case why should the Appeals Court *assume* from the testimony that Vollans towed the poles to a storing place or warehouse (in Washington) when he was sending 60 per cent. of them direct to California? There is no reason for having a warehouse for poles (if at all) near the supply, but near the market. If he had no storing place, he necessarily purchased the poles to fill orders already obtained in California. We should have a right to argue the *reasonableness* of the Court's *assumptions* to the jury. It is only where the facts are admitted, that the Court has a right to pronounce the law without a verdict.

We did not *waive* our right to a jury trial on these *fact* questions.

See Slocum case, 228 U. S. 364, on the right of Jury trial, where it is said:

"In trial by jury, the right to which is secured by the 7th Amendment, *both the court and the jury are essential factors.* To the former is committed a power of direction and superintendence, and to the latter the ultimate determination of the issues of fact. Only through the co-operation of the two, each acting within its appropriate sphere, can the constitutional right be satisfied. And so, to dispense with either, or to permit one to disregard the province of the other is to impinge on that right."

"Whether in a given case there is a right to a trial by jury is to be determined by an inspection of the PLEADINGS, and not by an examination of the evidence. If the pleadings present material issues *of fact*, either party is entitled to have them tried to the court and a jury. The issues to which the jury must respond are those *presented by the pleadings, and this whether the evidence be disputed or undisputed, and whether it be ample or meagre.*"

The Appeals Court further says:

"It was not known and could not be determined that any particular poles or particular car load of poles, were, while being carried on defendants' road, on their way to a foreign market."

Justice Ross answers this point, but such knowledge would make no difference with the Act of carrying the poles over defendants' railroad. The Act was the same in any event with or without

such knowledge. The parties knew where they were going at that time, on that lap or link, in the interstate chain of transportation, and Vollans knew how to direct them the balance of the journey. It was not necessary for plaintiff to go to California with the poles. No single brakeman could do that. It should be sufficient for us to show, under the Liability Law, that some part of the poles *finally did reach another state.* If we must show somebody's knowledge of where they were going, and an advance intention to send them there; it would be impossible to prove any case under the Liability Law, where such knowledge or intention could be so easily denied and so hard to prove. *Intention is always judged from action, and is a question for the jury to pass on.*

The decision of this case, therefore, comes back to the basic proposition heretofore insisted on, to-wit: That the plaintiff is entitled to all favorable inferences and assumptions which the jury might draw, and that a court should not usurp the functions of the jury in adopting *unfavorable* assumptions or inferences *of fact.*

LOGS.

There can be no question that defendants in error were engaged in interstate commerce. Their place of business is in the State of Washington. They keep an agent in San Francisco to whom they send lumber, and market 75 per cent. of their vast product in other states.

The only question in the instant case, is whether or not defendants use their railroad to assist in the interstate work. Justice Ross did not discuss the logs, as he concluded the transportation of the poles on defendants' railroad was a transportation service in interstate commerce. Justice Gilbert concluded the transportation of neither logs or poles was interstate commerce.

"Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, *as well as the purchase, sale and exchange of commodities.*"

Gloucester Ferry Co. v. Pa., 114 U. S. 196.

The short facts relating to the saw logs are as follows:

a. They were cut in the woods some distance from Bryant, and hauled by switch engine to the "Tap Line."

b. The crew in which Nordgard had worked for three years hauled the logs over the "Tap Line" from Bryant to Ebey Slough.

c. From Ebey Slough they were towed by defendants' tug to the mill pond at Ballard.

d. The logs were taken from the pond, sawed into lumber and taken away by off-bearers. One-fourth was piled in the yard to be sold locally; three-fourths being loaded on cars and boats for *shipment out of the state.*

This resume of the evidence shows there is no difference between the movement of logs from the woods to the mills in the "Tap Line Cases," 234 U. S. 1, *supra*, and the movement in the instant case. Defendants' "Tap Line" from Bryant to the water and their tug from Ebey Slough to the mill, performed an identical service which the "Tap Line" railroads performed in the cited case. There is no difference in principle between the two. Under the "Tap Line" cases the commerce on defendants' railway from Bryant to Ebey Slough was part of the interstate transit.

It might be said in passing, the decision of the "Tap Line" cases was not published until long after the instant case was submitted to the Appeals Court. To our mind it is absolutely controll-

ing on both "Common Carrier" and "Interstate Commerce," questions. Since it cannot be distinguished it must control.

This Tap Line adjudication is a direct consequence of the decision in *S. P. Ter. Co. v. I. C. C.*, 219 U. S. 498, where a party bought cotton seed cake in Texas, shipped it to Galveston, *manufactured it into meal*, and then exported it. This Court held it was interstate commerce from the *interior initial* points. There was no question of *taxation* involved, and the intention of the owner, as in the instant case, crystallized by action into interstate commerce. When the logs in the instant case were started from the woods, the *intention* to ship 80 per cent. of the lumber to interstate and foreign markets became a reality. It was carried into effect and became merged in the act. The following are the cases involving the *situs of property* for *taxation* purposes:

Coe v. Errol, supra. Bacon v. Ill., 227 U. S. 504.

Kelley v. Rhoades, 188 U. S. 1.

Am. Steel Co. v. Speed, 192 U. S. 521.

Gen Oil. Co. v. Crane, 209 U. S. 212.

Diamond Match Co. v. Ontonagon, 188 U. S. 82.

Goods may sometimes be taxed while yet in interstate commerce, and though the levy may indirectly affect such commerce, it is not a regulation of it. This was held in *Bacon v. Ill.*, where grain had been shipped from a western state *through* Illinois with permission to stop it for cleaning.

It is only where a *situs* for the taxation of property at some stopping point is concerned, or whether it shall go free of taxes while receiving the protection of the laws, the Court adopts a more restrictive construction. The wheat should be taxed somewhere. The government must be supported. Under the circumstances it had as much of a *situs* at the elevator as anywhere. The question there decided was:

"Did the enforcement of the local tax upon the grain in the elevator of the Plaintiff in Error, amount to an *unconstitutional interference* with *interstate commerce.*"

Merely determining the *situs* of property for taxation is beside the question here. In the Sabine Tram case holding lumber 37 days was held not to change its character as interstate commerce, when taxes were not involved, while delay of a much shorter time might give it a *situs* for taxation.

On the other hand, the following cases in-

volve the question of freight rates, and the question whether or not property was in interstate or foreign commerce, is directly passed upon.

Texas Ry. v. Sabine Tram Co., 227 U. S. 112.

S. P. Ter. v. Interstate C., 219 U. S. 498.

Ohio Com. v. Worthington, 225 U. S. 101.

United States v. Ry., 234 U. S. 1.

Gulf Ry. v. Fort Grain Co., 72 S. W. 419; 73 S. W. 845.

These cases do not differ essentially from the case at bar. The vital point in each was the character of the commerce. Delays that would entitle the goods to be taxed, if that were the question, are considered as incidents not essentials. In the case at bar, it is no longer a mooted question as to what the Defendants in Error did with 80 per cent. of the lumber, nor what Vollans did with 60 per cent. of the poles. The stipulation and testimony show they actually sent them forward into other states, as they intended to do when they started the commodities over defendants' railroad from the woods.

Colasurdo v. Central Ry., 180 Fed. 832, has been cited with approval by this Court, and it is there said of the Employers' Liability Act:

"It should be construed as intending to include within the term 'person employed in such commerce' all those persons who could be so included within the constitutional power of Congress; that is to say, the Act meant to include *everybody* whom Congress COULD include."

In affirming this ruling, 192 Fed. 901, the C. C. A. said:

"We think the statute was intended to apply to every carrier while engaging in interstate commerce, and to an employee of such carrier while so engaged, and, if these conditions concur, the fact that the carrier and the employee may also be engaged in *intrastate* commerce is *immaterial.*"

The Plaintiff in Error was obliged to make out only a *prima facie* case. It was enough in a jury trial to show that a percentage of the lumber made from the logs, hauled over defendants' railroad, was shipped east. *If essential*, the jury would be justified in finding that defendants intended to ship it when it was being hauled over their railroad; that they did not intend to stop it except for the incidental purpose of changing its form from that of logs to that of lumber. The jury having found it intended and actually did ship such lumber out of the state, it would necessarily find that defendants were engaged in interstate commerce at the time of Nordgard's injury. We most earnestly submit the Tap Line cases entitle us to a new trial.

What the court said in *Coe v. Errol*, should be considered in the light of the facts of that case, sensibly, not blindly.

During the winter prior to April 1, 1880, (the annual tax assessing date), Coe gathered some logs at the Town of Errol, which were taxed. Sept. 1, 1881, Coe brought his action to abate the tax. *The logs were still there at the time of trial*, and from all that appears, are there yet. They were not detained on account of low water or other natural cause. Coe said he intended to send them to Maine. *Necessarily*: *Sometime in the then future.* The Court said:

"Although intended for exportation, (assuming that Coe was honest in so stating) they may *never* be exported; the owner has a perfect right to change his mind."

Merely because the owner of personal property intends to move it to another state, *sometime in the future*, is not sufficient to exempt it from taxation while it lies dormant in the state where taxed. That is all the court decided.

In the instant case we find:

"That during the month of July, 1912, the logs, timbers and poles hauled by the defendant railway company over its road, were unloaded into Ebey Slough. Two-thirds of them were then towed to the mill at Ballard and there cut and prepared for

market and 80 per cent. of it delivered: *On board vessels or cars for shipment out of the State.*" (Tr. pp. 10-11.)

The testimony of Ives is even more conclusive. He said:

"We have an agent in San Francisco who sells lumber on commission. He sells it *before* he places the order. We send five million feet a year to him. Some of that we take out of the woods in Snohomish County.

"Ten million feet of lumber a year is taken out of the woods in Snohomish County down *over this railroad, then* hauled by tugs to the mill at Ballard, *then* cut up and sent to Eastern States."

"THEN," means: "*At that time.*" "Soon afterward or immediately," when referring to either the past or the future. (Cent. Dict.)

The precise question in *Coe v. Errol*, was:

"Do the owner's state of mind in relation to the goods, that is, *his intent to export them*, and his partial preparation to do so, exempt them from taxation?"

They were not yet exported. In the instant case, *they were already exported.* Nordgard assisted in hauling over defendants' railroad during the month of July, 1912, property which had already gone to other states. Lumber and shingles since growing old on farm houses in the Prairie States. Defendants received his labor in the interstate transaction. The logs were "milled in transit" at

Ballard and were in the course of *commercial transportation* from the time they left Bryant, under *Coe v. Errol* and all the later cases. Manufacturing and the delay of transferring from rail to water carriage, are only, "*incidental interruptions* in the continuity of the transportation."

If plaintiff made no further showing than that the logs went to Bryant, and were still there, (though the owners had expressed an intent, as Coe did, to send them in the future to other states, and for that reason were resisting an annual tax); if the *intent*, to cut the logs into lumber and send it to other states, *was not yet acted upon;* then *Coe v. Errol* might apply, as the owners might still change their mind and market the logs locally. But this intent having been carried out and the act completed, during July, 1912, when Nordgard was injured; so the owners could not change their mind; necessarily the movement of logs over defendants' railroad was the beginning of the interstate movement.

"Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the States has commenced." The Daniel Ball, 10 Wall, 557-65; 19 L. Ed. 999.

It is hard to understand how an intelligent court could overlook the fundamental difference in the facts, and then theorize on what might or might not become of the lumber cut from the logs in the instant case, *if defendants had changed their mind*, when it was admitted at the trial *they had not*, but carried out their intent by marketing the product of the logs that month beyond the state.

In the "Tap Line" cases, this Court in speaking of and affirming the Commerce Court, said:

"As it was held to be a transportation service by an *interstate common carrier*, as to the non-proprietary mills, it must be held to be a similar service as to the *proprietary* mills."

The Conclusion of the Appeals Court on the lumber in the instant case, disregards the positive evidence of Ives, that their agent in San Francisco sells the lumber *before* he places the orders. The logs must be taken out and the lumber cut to fill such orders. If intent is material, surely the jury might find defendants *intended to do*, what they *did do*.

This Court, to attain the object sought by Congress, has broadened, rather than narrowed, the application of the law.

In *North Car. Ry. v. Zachary*, 232 U. S. 248, this Court held the defendant Ry. Co. as *lessor*, employed the plaintiff through the *lessee* company.

See also, *Pederson v. Ry. Co.*, 229 U. S. 146; *St. Louis Ry. v. Seale*, 229 U. S. 156.

But interstate commerce is an *act*, not an intent, or knowledge. What took place in the past is an admitted and sealed fact. On July 29, 1912, defendants hauled logs and poles over their railroad and Gunder Nordgard was employed by them in that work. 60 per cent. of the poles carried that day, went to California, and 80 per cent of the lumber and shingles cut from the logs went to other states. *These facts cannot be speculated upon or changed now.* It is unimportant what the owners' *intention* then was, regarding the destiny of the lumber and poles, or their knowledge of such destiny. The Sabine Tram case, expressly holds that knowledge by the shipper of the logs destination is immaterial. An owner's intention might be changed or misstated. Here the logs and poles *were sent* without the state. The act was the same no matter what the intent was, or might have been. A different intent could not change the completed act of the past. To hold otherwise is to base Court decisions, not on what

did occur, but on what then, *might* have occurred. Not on what the parties did do, but on what they might have done.

In *Coe v. Errol* this Court held that *intention* to ship logs without doing so, was not sufficient to constitute interstate commerce. In the case at bar, the lower Courts held, the completed act of shipping the logs was not sufficient because an *advance intention* to do so was not shown. One holds *the act* is interstate commerce regardless of intent, the other that intention is necessary to interstate commerce regardless of the completed act.

After reviewing the Sabine Tram, and other cases in an effort to distinguish them, from the case at bar, Judge Gilbert says:

"In all of these cases the goods, from the time of their initial shipment, were all on their way to points in another state or country. There might be a pause or delay at the point of transshipment; there might be uncertainty of identity of connecting carrier; there might even be uncertainty as to the precise point of their ultimate destination; but in each case it could be positively affirmed that from the beginning of their transportation they were all in course of transit to points beyond the state in which the original shipment was made."

In these conclusions there is only one that is not fully satisfied in the instant case. We can't say, ALL the poles and logs hauled over defend-

ants' railroad, went beyond the state. But that is unnecessary. It could be "*positively affirmed*, from the beginning"—when the logs started,—that 60 per cent. of the poles and 80 per cent. of the lumber, were in course of transit to points beyond the state in July, 1912. The Liability Law does not require that *all* freight carried on railroads must be interstate. If it did the law would be useless. Where traffic is mixed, railroad employees are entitled to the benefit of the Act. It is only when the employee is engaged *exclusively* in *intrastate* commerce, that he is not. In the Worthington case, some of the coal was diverted and used commercially at Huron. The *amount* is immaterial. The part that went to other states was held to be Interstate Commerce from the time it left the coal fields in the interior of the state.

In the instant case, the Appeals Court concludes:

"There was no initial shipment of the goods. The transportation of the poles from the forest in which they were cut to tide-water, where they were sold, was not a shipment. There was no contract of carriage; there was no bill of lading; there was no consignor or consignee. The goods were not committed to a carrier. The defendant Mill Company simply carried over its own road, on its own cars, its own goods to market where it sold and delivered them. It had no concern with the sub-

sequent disposition of them. It was under no obligation to deliver them to another carrier, and no other carrier was under obligation to receive them or carry them further. The selling of the poles after the first sale by the Mill Company, or whether they were going outside of the state, depended upon chance or the exigencies of trade. The movement of the poles did not become interstate commerce until by the act of the purchasers thereof the poles were started on their way to the destination in another state or country. The beginning of the transit which constitutes interstate commerce is defined in *Coe v. Errol* to be the point of time when an article is committed to a carrier for transportation to the state of its destination, or started on its ultimate passage. *General Oil Co. v. Crain*, 209 U. S. 211, 229."

Most of these objections are already answered. But, the Court here reaches the conclusion that defendants' railroad was a "Plant Facility," and could not be engaged in interstate commerce by hauling its own logs to its own mill. This is in direct conflict with the "Tap Line" cases, that the carrying of *proprietary* logs to the mill was interstate commerce the same as *non-proprietary*.

They are also answered in the Sabine Tram case where a part of the lumber was diverted and used at Sabine and where, after reviewing *Coe v. Errol*, and comparing it with *Texas Ry. v. Int. Com. Comm.*, it was said of the latter:

"It was contended that the transit of the cake and meal absolutely ended at Galveston, that

point being their final point of concentration and manufacture, the cake being there manufactured and sacked for export. The contention was rejected by the application of the principle which we have expressed. The points of resemblance between that case and the one at bar are obvious. ARE THE POINTS OF DIFFERENCE ESSENTIAL? In both cases the article was intended for export, but had no definite foreign destination, *nor had it been 'committed to a common carrier for its final continuous voyage to a foreign point.'* "

"The determining circumstance is that the shipment of the lumber to Sabine *was but a step* in its transportation to its real and *ultimate destination* in foreign countries. In other words, the *essential character* of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principal, and means will be afforded of evading the national control of foreign commerce from points in the interior of a state. *There must be transshipment at the seaboard;* and if that may be made the point of ultimate destination by the device of separate bills of lading, the commerce will be given local character, though it be essentially foreign."

In *United States v. Ohio Oil Co.*, 234 U. S. 548, this Court again held:

"The transportation of oil in pipe lines between points in different states is *interstate commerce*, although *all the oil* transported may belong to the owners of the pipe lines."

The objections of the Appeals Court would deny the benefit of the Liability Law to all employees en-

gaged in transporting empty cars for the railroads, for there is no shipment of the cars; no bill of lading; no consignor or consignee, (The men however do the same character of work.) Nor are the cars committed to a carrier. The railroads haul their own empty cars in their own way, on their own railroad. In the Zachary case, 232 U. S. 248, this was held to be Interstate Commerce.

In *Interstate C. Com. v. Ill. Ry.*, 215 U. S. 452, the company's coal cars were included.

In *Johnson v. S. P. Ry.*, 196 U. S. 21, this Court quotes from *Voelker v. Ry.*, 116 Fed. 867, with approval, as follows:

"It cannot be true that on the eastern trip the provisions of the act of Congress would be binding on the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty."

In the case at bar, the Appeals Court further says:

"The selling of the poles after the first sale by the Mill Company, or whether they were going outside of the state, depended upon chance or the exigencies of trade."

In the case of *N. P. Ry. v. Maerkl*, 198 Fed. 1, the same Court held that an injured employee was entitled to the benefit of the Liability Act where the company was repairing its own car in its own

shop, in its own way, and it was stipulated that after being repaired, the *use* of the car in interstate commerce depended upon chance and the exigencies of trade. No one could tell how it had been, or *would* again be used except that it was *likely*, it had been, and would be used indiscrminiately in both kinds of commerce.

In Gulf Ry. v. Texas, 204 U. S. 403, it was said:

"That the ownership or control over goods in process of transportation, which may be repeatedly changed by sales, is one thing; *the transportation* is another thing."

In *Coe v. Errol*, it is further said:

"Although *intended* for exportation, they may *never be exported*, the owner has a perfect right to change his mind. * * * It *may be sold* or otherwise disposed of within the state, and *never put* in course of transportation out of the state."

The Appeals Court, adds:

"The language so used in that opinion applies in every particular to the facts in the present case."

The language so used could apply only where the *logs had not yet moved* from their resting place in the state where taxed. It cannot apply where the logs *had already gone*. In one case, "they may never be exported," in the other, "*they have already been exported.*"

In the case at bar, the Appeals Court holds the first lap of the interstate journey is no part of the transportation; that it is only when it is delivered to the *last* carrier on the final lap of the journey, that the interstate character begins.

In *Duluth-Sup. Co. v. N. P. Ry.*, 140 N. W. 1105, *supra*, the Court in reviewing *S. P. Ter. Co. v. Int. C. C.*, 219 U. S. 498, says:

"The initial lines, the switching company lines and the terminal tracks were all held to be links in the transaction of *interstate commerce business* as to products intended for transit, which in the whole was of interstate character, and that when the property was delivered to the *initial* carrier it was said to have been delivered *for the entire purpose.*"

In speaking of *U. S. v. Union Stock Yards*, 226 U. S. 286, the Court says:

"The fact that the performance of the service is distributed among different corporations, makes no difference where the service to be performed is a part of the carrying of freight by railroad."

Each corporation, as each individual, is doing it own part of the whole work accomplished and carried on by all. It is the same work as if one concern was doing all parts of it.

In *Mondou v. Ry.*, 223 U. S. 1, it is said:

"The ACT of Interstate Commerce is done by the *labor of men*, and with the help of things; and

hence men and things are the agents and instruments of the commerce."

This *Act of Interstate Commerce* is the same act whether one or a dozen individuals or corporations perform it. When several perform the ACT, each does his own part, but altogether the *Interstate Commerce Act* is completed. Employees working on a railroad which does any *part* of the whole completed act, comes within the Liability Law. Without the work of *each*, the whole would be incomplete. The act which is interstate commerce becomes so from the act itself, not from any intent. If it is interstate commerce with one intent, it is also interstate commerce with any other intent.

Defendants keep an agent in San Francisco to whom they send five million feet or more annually, and ten million feet or more is brought down over their railroad, THEN hauled to the mill at Ballard, THEN loaded on cars and sent to Eastern States. Here the railroad is carrying this interstate commerce in a constant and continuous stream. Without the railroad the supply would be cut off. It is just as essential as any other part of the transit. Aside from the poles which went to California, defendants, (and Nord-

gard as a brakeman on their railroad) were engaged in commerce among the states.

No sound reason can be advanced for denying the benefits of the Employers' Liability Act to a brakeman on defendants' railroad hauling freight to the mill, and allowing it to the brakeman on the other railroad hauling the same freight in changed form, away from the mill. The work of each is dependent on the other, and both constitute interstate commerce work, of taking timber from one state and supplying the people's needs in other states.

An examination of the cases we have cited will show it is immaterial whether there was a technical shipment of the logs over defendants' railroad; who owned the logs, or whether there was a consignor, a consignee, a bill of lading, or any of the other things the Court mentions.

The whole thing in a nut-shell is most simple, not intricate, unless it is made so. It is this: Defendants were operating a common carrier railroad, over which they carried freight, a large part of which was intended for, *and went to other states.* Nordgard was employed in *that work* as a brakeman on *that railroad* by the defendants while they were carrying *that commerce.* Defendants' railroad was

assisting in the *interstate work*. It was built for that purpose. Without it they could not carry on the work. Any jury would necessarily find these facts from the evidence. The Court should not usurp their functions to conclude otherwise on its own *assumptions*, and disregard the evidence. Under the 7th Amendment the Court should submit these *fact questions* to the Jury. Nordgard's plain constitutional rights were denied him which requires a reversal.

FEDERAL ACT APPLIES.

The foregoing argument also answers the *fourth* question asked in the beginning of the brief. The Federal, not the State Act, applies in this case.

In *St. Louis Ry. v. Hesterly*, 228 U. S. 702; 57 L. Ed. 1031, it is held:

"The Liability of an interstate railway carrier for personal injuries resulting in the death of a servant while employed in interstate commerce is measured by the Federal Employers' Liability Act of April 22, 1908, *which supercedes all applicable state laws.*"

The decisions of both Courts should be reversed and a new trial on the merits before a Jury allowed.

Respectfully submitted.

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Geo. F. Hannan
Chas. R. Pierce,

In the Supreme Court of the United States

P. J. McCLUSKEY, as Administrator of the Estate of Gunder Nordgard, Deceased,
Plaintiff in Error,
vs.
MARYSVILLE & NORTHERN RAILWAY COMPANY and STIMSON MILL COMPANY,
Defendants in Error.

No. 166
October Term, 1916.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PLAINTIFF IN ERROR.

JOHN T. CASEY,
Attorney for Plaintiff in Error.
Seattle, Washington.

GEORGE F. HANNAN,
CHAS. R. PIERCE,
Of Counsel.

JURISDICTION OF THIS COURT.

Defendants in Error question the jurisdiction of this Court because some formal steps in obtaining the Writ were necessarily taken in the name of the decedent before the administrator could be substituted. Using the name of the decedent, when the cause of action survives, as it does here under Sec. 9 of the Liability Act,—Amendment April 5, 1910, at most is an irregularity. Even if jurisdictional, it is personal, and like a defective service of summons may be waived by appearance. Defendants in error waived any defect or irregularity in the Writ by making a *general* appearance, (Tr. 44-5) in response to the citation served upon them. Such an irregularity may even be corrected by a *nunc pro tunc* order. *U. S. Bank v. Weisiger,* 2 Peters 481; 7 L. Ed. 492. Many cases hold an appeal or writ of error may be regularly prosecuted to the end in the name of the decedent, and failure to make substitution is immaterial. *Wilhite v. Skelton,* 149 Fed. 67. *Phelan v. Tyler,* 64 Cal. 80: 28 Pac. 114. *Twaddle v. Winters,* 89 Pac. (Nev.) 289. *Williams v. Ry.,* 115 Iowa, 520:88 N. W. 1057. *Hopkins v. Hopkins,* 15 S. W. (Ky.) 854. *Miller v. Gunn,* 7 How. Pr. 159. *Spurk v. Vangundy,* 3 Oh. 307.

Galveston Co. v. Nolan, 53 Tex. 146. *Pullman Co. v. Fowler,* 27 S. W. 268. *Butcher's Heirs v. Kunst,* 64 S. E. (W. Va.) 968. The cause of action surviving, using the name of administrator or decedent, is a matter of procedure or convenience in getting the case up. The Writ was granted and citation served. The cause, and both parties, are before the Court. Jurisdiction is complete now and the merits should be determined. Rule 15 covers the point raised. The latter part reads as follows:

"And provided, also, That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases."

See also *New Orleans v. Rollins,* 36 Miss. 384, and *Phares v. Saunders,* 18 W. Va. 336, holding the personal representative may bring writ of error without proceedings to revive.

After the writ was granted, the administrator appointed, and citation served on Defendants in Error, they stipulated, the substitution might be made in the Appeals Court. That Court expected the substitution to be made here, as the writ had already been granted. Defendants in Error then

made a further *stipulation in this Court* providing the administrator might be substituted here, and an order was regularly made on that stipulation, substituting the administrator as Plaintiff in Error; all of which counsel seems to have overlooked.

The cause of action surviving, all questions in regard to the jurisdiction of this court to hear and determine the writ of error on its merits have been waived. *Bigler v. Waller,* 12 Wall.: 79 U. S. 142: 20 L. Ed. 260.

Defendants in Error also state the cause of action does not survive under Sec. 9 of the Liability Act, because it does not *affirmatively* appear that beneficiaries exist. This Court will not presume there are no beneficiaries even if the record did not show the contrary. If the lower courts were in error in dismissing the case in the beginning, this Court will correct that error on the record before it, and send the case back for further proceedings. It will then be a question for the District Court to deal with beneficiaries, and determine who they are. The administrator should have an opportunity to amend the complaint, should that become necessary. This Court will not dismiss the case as *moot,* unless that fact clearly and affirmatively appears.

Defendants in error, however, have overlooked the affidavit and statement served on them May 11, 1915, which stated the writ was to be prosecuted by P. J. McCluskey as Plaintiff in Error for the estate and for decedent's father, who is old and helpless and without means, and for the benefit of his creditors. Counsel for defendants in error upon that statement being served, and full notice of all the facts, stipulated the substitution might be made by this Court, which was done.

The cases cited on page 4 of defendant's brief have no application under these facts. *St. Louis Ry. v. Croft,* 237 U. S. 648: 59 L. Ed. 1160, answers every objection of defendants in error on this branch of the case, to which we respectfully refer the Court. Nordgard suffered through defendant's negligence, not 30 minutes only, as decedent in the Croft case, but with singular fortitude for 31 long and weary months. See also *Taylor v Taylor,* 232 U. S. 363: 58 L. Ed. 638, and cases reviewed.

ON THE MERITS.—INTERSTATE COMMERCE.

Defendants in Error practically admit the correctness of the conclusions by Justice Ross on the

poles, but say these were transported *prior* to April, 1912. Referring to July when he was injured, Nordgard testified, (Tr. 11) they were hauling poles for a pole man in Everett. Defendants also admit in the stipulation, (Tr. 10) they were hauling poles in July. Witness Vollans might be mistaken in the date. His statement is not conclusive. Nordgard and his crew were hauling poles during July, for a pole man in Everett. If Vollans was not the man, it was someone else, who, it should be presumed, without a verdict to the contrary, sent the poles similarly, 60% to California. There being some evidence of the fact; unless defendants in error admit that some poles were being hauled for a pole man in Everett on their way to California when Nordgard was injured; *then it is for the jury to find the facts,* and say whether he or Vollans was correct about the date. The Court had no right to assume all the facts in defendant's favor and dismiss the case without a verdict, when there was conflicting evidence on the issues raised in the pleadings.

On page 6 of defendant's brief, it is assumed knowledge on their part of where Vollans was sending the poles and piling was necessary. The authorities cited on page 23 of our opening brief, hold,

knowledge by the shipper of the logs destination is immaterial. It can make no difference with the employe's work whether or not the employer had knowledge of where the freight was going. If it did, as stated by Justice Ross, (Tr. 34) the jury might readily find such knowledge from constant dealing and shipping. Nordgard's labor as a brakeman on defendant's railroad was the same with or without such knowledge.

Defendants in error cite *Illinois C. Ry. v. Behrens,* 233 U. S. 473, to the point that the injured employee must suffer injury while he is employed by such carrier in such commerce. That, of course, is the law, and Nordgard comes squarely within the rule. He was unloading freight from the cars; 60% of the *poles freight* was on its way to California, 75% of the *logs freight* on its way to be, "milled in transit" *to fill Prairie State orders for lumber and shingles previously obtained.* There was at least some evidence of all these facts to submit to a jury.

Twenty-five per cent of the lumber and 40% of the poles was *local.* The balance filled *interstate* orders and was *interstate* commerce. Nordgard was employed in both kinds at the same time; Behrens was employed *solely* in *local* commerce.

Counsel (brief 11) quotes from The Daniel Ball 10 Wall. 557, as follows:

"Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced."

Here the interstate movement of the commodities started on defendant's railroad. We wish, however, to quote further:

"The fact that several different and independent agencies are employed in transporting the commodity, *some acting entirely in one state,* and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, *it is subject to the regulation of Congress.*" (Italics ours).

"If its authority does not extend to an agency in such commerce when that agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of the state, and leaving it at the boundary line at the other end, the federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter."

This language seems specially fitted for the case at bar.

In conclusion, Defendants in Error, contend their business is that of "manufacturers of lumber." *Manufacturing* is only a part of their business. They also operate a railroad. The Marysville & Northern Railroad was not *manufacturing*. Neither was the Stimson Mill Company in operating the *railroad*. *Kidd v. Pearson*, 128 U. S. 1,, 20 is not in point. If Nordgard was employed in defendant's mill the Kidd case would apply. Being employed on the railroad it has no application. Because defendants were operating a saw mill, does not relieve them from negligence on their railroad under the Liability Act. Nordgard was not working in the mill or the woods, in a factory or on a farm, but as brakeman on a railroad carrying 60% to 75% interstate freight.

CONCLUSION.

In the brief, (p. 10) counsel says there was no question of fact for a jury's determination. Yet they argue there were no poles going to California in July. Nordgard's testimony, and their own stipulation, show the contrary. Ives' testimony, (Tr. 15) shows the capacity of their mill was 175,000 feet in

ten hours. One shift daily, more than fifty million annually,—two shifts double that amount. Seventy-five per cent of this great trade was interstate. As in the Bay case (No. 165) the local trade was unimportant. Their railroad was built to care for this large *interstate* business. Without it they could not carry on such business. One agent in San Francisco selling five million feet annually. Ten million going over their railroad to the mill; then in changed form sent to Eastern states. Yet it is insisted they had no knowledge of the logs and poles destination. If that was material, the jury should settle it, with other disputed questions. On motion for dismissal, the Court should not resolve all or any disputed facts in favor of defendant. Under the Slocum case, 228 U. S. 364, this error alone requires a reversal, unless the jury has become an "ornament only", in the trial of fact issues in Federal Courts. Carrying this large amount of interstate commerce over defendant's railroad, and employing Nordgard in the work, unmistakably brings this case within the express provisions of the Federal Liability Act. The action of the lower courts in dismissing the case should be reversed.

We call attention to Pennsylvania Ry. *vs.* Sonman Coal Co., No. 10, decided December 4, 1916, since briefs were written. It is there held:

> "The sale and delivery of coal F. O. B. cars at the mine for transportation to purchasers in other States is interstate commerce."

Also: Swift and Co. *vs.* United States, 196 U. S., 375, 396-400, where it is held, the purchase of cattle at stock yards, and again the sale of the dressed meats, is interstate commerce. It is there said:

> "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the *expectation* that they will end their transit, *after purchase* (as dressed meats) in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce. * * * It is immaterial if the section also embraces domestic transactions."
>
> "The question of taxation does not depend upon whether the article taxed may or may not be said to be in the course of commerce between the States, but depends upon whether the tax so far affects that commerce as to amount to a regulation of it." Opinion, 398-9.

In Ill. C. Ry. *vs.* La. R. Com., 236 U. S., 157-163, it is said:

> "When freight actually starts in the course of transportation from one State to another it becomes a part of interstate commerce. *The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved.*"

In Pa. Ry. *vs.* Clark Coal Co., 238 U. S., 456, 465-6, it is said:

> "In determining whether commerce is interstate or intrastate, regard must be had to its *essential character*. Mere billing, or the place at which title passes, is not determinative. If the *actual* movement is interstate, the power of Congress attaches to it."

The facts as admitted in the Bay case, No. 165 (Defendant's brief, page 5), and the stipulated facts in the McCluskey case, No. 166, bring both cases clearly within the rule of what interstate commerce is defined to be by the foregoing authorities.

Respectfully submitted,

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Attorney for Plaintiff in Error.

GEO. F. HANNON,
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Of Counsel.

FILED
DEC 21 1916
JAMES D. MAHER
CLERK

In the Supreme Court of the United States

No. 166

October Term, 1916

P. J. McCLUSKEY, as Administrator of the Estate of Gunder Nordgard, deceased,

Plaintiff in Error,

vs.

MARYSVILLE & NORTHERN RAILWAY COMPANY and STIMSON MILL COMPANY,

Defendants in Error.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF DEFENDANTS IN ERROR

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In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF DEFENDANTS IN ERROR

Jurisdiction of This Court.

The printed transcript of the record in this case discloses that judgment of affirmance was entered by the Circuit Court of Appeals on November 9, 1914 (Record, p. 36). It appears by the stipulation of the parties filed in said Court that Gunder Nordgard, the plaintiff in error therein, died on February 28, 1915, and that P. J. McCluskey had

been appointed administrator of his estate on the 23rd of March, 1915, by the Superior Court of the State of Washington for King County; and it was stipulated that said administrator might be substituted as plaintiff in error in said cause (Record, p. 40). This stipulation was presented ex parte to the Circuit Court of Appeals by Mr. John T. Casey, as counsel for the plaintiff in error, on April 27, 1915, with a motion asking for an order substituting the administrator for the deceased plaintiff in error; and that Court (though, as it appears to us, erroneously) denied the motion on the ground that, a writ of error having been previously sued out, it was without further jurisdiction at the time to make the order of substitution applied for (Record, p. 41). It appears that the original petition for the writ of error herein, together with the assignment of error, was filed on March 15, 1915, after the death of Nordgard, and that on the same date an order allowing said writ was signed by William B. Gilbert, Circuit Judge, and on the same date filed in said Court (Record, pp. 37, 38).

Notwithstanding the foregoing facts, counsel who appeared for the deceased plaintiff in error in the court below has substituted the name of the administrator of the estate of Gunder Nordgard, deceased, as plaintiff in error, and is seeking to have the writ of error ordered and allowed in the name of Nordgard as plaintiff in error, but after his decease, now reviewed by this Court.

The allowance of the writ after the decease of the plaintiff in error was unauthorized and void. It appears to be well settled that an appeal or writ of error cannot be granted to one who is dead; and the allowance and issuance of such writ is a nullity.

Ency. of Pl. & Pr., Vol. 2, p. 197.
Corpus Juris, Vol. 3, p. 1020.
Jackson's Admin. v. Wickham et al., (Va.) 70 S. E. 539.
Booth v. Dotson (Va.) 24 S. E. 935, 936.

There is, therefore, no writ of error before this Court which has ever been petitioned by or allowed to the present plaintiff in error, and hence there is nothing before this Court which it can review.

The case does not fall within Rule 15 of this Court for the reason that the party did not die pending a writ of error, but was already deceased at the time when the writ of error was attempted to be sued out in his name. The cause is, therefore, not properly pending before this Court and cannot be now reviewed by it.

Moreover, it may be further observed that the cause of action of the original plaintiff in error does not survive except by virtue of and according to the provisions of Section 9 of the Employers' Liability Act, enacted by the amendment of April 5, 1910, which is as follows:

> "Sec. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband

and children of such employe, and, if none, then of such employe's parents; and if none, then of the next of kin dependent upon such employe, but in such cases there shall be only one recovery for the same injury."

The statutory right of action which thus survives is for the benefit of certain named persons. Unless such persons exist there can be no surviver, for there can be no right of recovery. There is no showing in the record in this case that any such beneficiaries in fact exist. Since the death of Nordgard, the original plaintiff in error, is disclosed by this record, it should be made to appear affirmatively that a cause of action has survived in favor of existing statutory beneficiaries.

Gulf, C. & S. F. v. McGinnis, 228 U. S. 173, 176.
Illinois Central R. R. v. Doherty, 155 S. W. 1119 (Ky.), 47 L. R. A. (N. S.) 31.

When the controversy between the parties has become moot, the writ of error will be dismissed.

Buck's Stove etc. Co. v. American Fed. of Labor, 219 U. S. 581.
Martin v. B. & O. Ry., 151 U. S. 673, 703.
Jones v. Montague, 194 U. S. 147.
Richardson v. McChesney, 218 U. S. 487.

On the Merits.

I.

Counsel for the alleged plaintiff in error seeks to sustain his writ upon the merits by force of the dissenting opinion of Justice Ross, which proceeded

upon the theory that both the original plaintiff and the defendants in error were, at the time of the former's injuries, engaged in interstate commerce, because of the erroneous asumption that about sixty per cent. of certain telephone poles purchased from the latter by one Vollans "were intended for continuous transportation by the purchaser to another State."

It is alleged in the complaint that the defendant corporations were on the 29th of July, 1912, engaged in the hauling of timbers and logs as common carriers over their railroad and were dumping the same into the waters of Puget Sound at the town of Marysville, and "were then and there engaged in interstate and foreign commerce and plaintiff was then and there employed in said work by the defendants." It is also alleged in the complaint and admitted in the answer that the original plaintiff, Nordgard, was injured on the 29th day of July, 1912, while unloading logs into the water at said place.

The testimony of Vollans was that he was a dealer in cedar poles and piling and had dealt with the defendants in error; and that he sold about sixty per cent. of his poles and piles in California. He further testified:

> "My dealings were entirely with the Stimson Mill Company. I bought the poles from them and they delivered them into the water at Ebey Slough, where they were received by me. I paid so much a pole delivered in the water at Ebey Slough. There I took the poles,

> rafted them and towed them away. *This was prior to April, 1912.*" (Record, p. 13.) (Italics ours.)

The only other testimony on the subject was that of Mr. Ives, who said:

> "The poles of which Mr. Vollans spoke were sold to him delivered in the water; we didn't haul them as a carrier; it was in the business of logging we hauled them. * * * Those that are sold in the slough the purchaser rafts and tows away himself. * * * No charge is made to Mr. Vollans for hauling; he buys the poles delivered in the water at Marysville." (Record, pp. 14, 15.)

It thus appears that the transaction of the defendants in error was completed when they sold and delivered the poles and piling to Vollans in the waters of Ebey Slough at Marysville. They had no knowledge of and nothing to do with the disposition which he might thereafter make of them.

But whatever may be said as to the correctness of the conclusion of Mr. Justice Ross, in his dissenting opinion, that such facts constituted interstate commerce so as to bring the defendants in error within the operation of the Employers' Liability Act, he entirely overlooked the fact that the transactions with Vollans were concluded in the month of April, 1912, more than three months before the injury complained of herein. These facts can, therefore, have no possible bearing upon the question of law involved herein.

II.

There is no diversity of citizenship in this case. If any jurisdiction exists in this Court, therefore, it must depend on facts which bring the case within the provisions of the Employers' Liability Act, which, so far as is here material, reads as follows:

> "Sec. 1. That every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * ."

It is not necessary in this case to consider the question whether either of the defendants in error was at the time of the injury of the employe engaged in performing the function of a common carrier railroad, which is disputed in the evidence. The case may be disposed of on the merits by a consideration solely of the question whether the injuries of Nordgard were suffered while he was employed by the defendants in error as a carrier in interstate commerce. On this question this Court has said:

> "Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employe is engaged is a part of interstate commerce."
>
> *Illinois Central R. R. v. Behrens,* 233 U. S. 473, 478.

A stipulation of facts was read in evidence upon the trial by counsel for the plaintiff, which recited:

"I. That the Marysville & Northern Railway Company was organized as a common carrier railroad; that said railroad has ever since been and now is employed in transporting the logging products of the lands of the Stimson Mill Company and dumping them into the waters of Ebey Slough, a tributary of Puget Sound near the town of Marysville in Snohomish County, Washington.

II. That during the month of July, 1912, and prior and subsequent thereto, said railroad was owned and controlled by the stockholders of the Stimson Mill Company; * * *.

III. That of the logs, timbers and poles hauled by the defendant railway company over its road for the defendant mill company in July, 1912, and unloaded into Ebey Slough as aforesaid, about one-third were sold and delivered to the purchasers at said point, and the balance were towed to the saw mill of the Stimson Mill Company at Ballard, Washington, and there cut and prepared for market; that the towing of said logs was done in part by the tug of the Stimson Mill Company and in part by other tugs hired for that purpose.

IV. That the lumber products so manufactured out of said logs, timbers, etc., by the Stimson Mill Company were during the month of July, 1912, and ever since have been disposed of by it as follows: About twenty to twenty-five per cent. sold for use in the local market and delivered to the purchaser at the mill; the balance sold for shipment out of the state, either by water or rail, and delivered on board vessels or cars to the purchaser at Ballard, Washington, billed as directed by the purchaser; that during said time none of the said lumber products have been shipped out of the

state by any vessel or other means of transportation owned or controlled by the Stimson Mill Company." (Record, pp. 10, 11.)

The plaintiff Nordgard testified that on the 29th of July, 1912, he was braking on the Marysville & Northern Railroad and was injured at Marysville while unloading logs from the cars into Ebey Slough. Mr. Ives, manager for defendants in error, testified:

"We do not now and never have maintained an office in San Francisco. We have an agent in San Francisco who sells lumber on commission. We sell lumber to him; he places an order with us and we give it to him on one of his ships that come here. He has a good many steam schooners that come up here, and we put it on the barges or they come to the dock and take it away. We sell it to him on board those vessels. We make the delivery to his vessel. He sells it before he places the order. For the last five years we have not sent over five million feet a year to him. Some of that we take out of the woods in Snohomish County. Five or ten million feet of lumber a year is taken out of the woods in Snohomish County down over this railroad, then hauled by tugs to the mill at Ballard, then cut up and sent to eastern States.

* * * The capacity of the mill at Ballard is 175,000 feet in ten hours. We manufacture mostly our own logs. We sell all of our products here; part of it goes to the local market in Seattle; as to the rest of it we receive orders and deliver it on cars, billed to the party who orders it. If anybody orders a carload of lumber we put it on the car for him. If a foreign vessel comes in we load it and it takes the lumber away from the mill. Mr. Baxter in California will call up and ask me if I can bill such

and such an order and how much I will charge for it. He may not place the order with us; he sells for other mills; he is a broker and shipowner. He sends ships in which he is interested for the lumber. When he places the order with us he gets a brokerage commission and that is the only relation he has with us. When we receive an order for shipment to California, we cut it in the mill, pile it on the dock, and a steamer comes alongside the dock and herself loads it on board. We are paid here. In case of carload lots we are paid on the delivery of the shipping bill.

* * * * * * * *

We do not sell any lumber in foreign markets. We sell most of our lumber here, and what we sell East we sell to the selling agency here, after which we have nothing to do with it. They ship it to the Eastern market. We place it on the cars.

* * * * * * * *

The lumber which is brought out of the woods is not brought as lumber, but as logs, and is sent to the mill, where, with other logs which we buy, it is manufactured."

(Record, pp. 14, 15, 16.)

The foregoing stipulation of facts and testimony is, we think, all the evidence in the record bearing on the question at issue, namely, whether the service in which Nordgard was engaged at the time of his injuries was a part of interstate commerce. There is no question of fact for determination by a jury. The question is solely one of law, and its solution appears to us so clear, that argument is unnecessary.

The test of what constitutes interstate commerce

is well stated by this Court in the case of *The Daniel Ball,* 10 Wall. 557, as follows:

> "Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced."

This doctrine as to what constitutes interstate commerce, when its nature as intrastate or interstate is dependent upon the mere matter of its transportation, has been uniformly sustained by the decisions of this Court. The cases cited by counsel for plaintiff in error are all plainly distinguishable, so clearly so that the labor of pointing out the distinctions would be a work of supererogation.

For additional authorities upon the subject we refer to our brief in the case of *August Bay v. Merrill & Ring Logging Company,* a sister case submitted at this term of the Court.

In conclusion, we suggest that the business of defendants in error is that of manufacturers of lumber. As a part of that business they cut logs from their own land and transport them to their mill. It was in this work that Nordgard was employed at the time of his injuries.

In *Kidd v. Pearson,* 128 U. S. 1, 20, it is said:

> "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacturers and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation inci-

dental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. * * * If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry."

Respectfully submitted,

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McCLUSKEY, ADMINISTRATOR OF NORDGARD, v. MARYSVILLE & NORTHERN RAILWAY COMPANY ET AL.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 166. Argued January 30, 31, 1917.—Decided March 6, 1917.

The course of business of a company engaged in logging and milling timber consisted in carrying its logs from its own timber-land within a State over its own logging railroad to tidewater, in the same State, in selling there a part to others who towed them away and re-sold them to purchasers within and without the State, and in towing the rest to its mills in the same State, milling them at the latter place and then disposing by sale of their products partly in local markets and partly in other States and countries. *Held*, that the transportation of the logs by the railroad was not interstate or foreign commerce, and that an employee of the railroad, injured while engaged in unloading some of them at the tidewater terminus, was not employed in such commerce, within the Federal Employers' Liability Act.

A plaintiff in an action for personal injuries based on the Federal Employers' Liability Act died while the case was pending in the Circuit Court of Appeals. Writ of error to review an adverse judgment of that court having been subsequently sued out in his name and citation issued and served, attorneys for both sides stipulated that his administrator might be substituted. Substitution, however, was refused by the Court of Appeals upon the ground that the writ had deprived it of jurisdiction. Upon a motion to dismiss upon the ground that the writ was wrongfully allowed and the administrator not properly a party, *Held*, that the defect of the proceedings was at most an irregularity which, in view of the stipulation, was waived. 218 Fed. Rep. 737, affirmed.

After judgment against plaintiff in the court below, the writ of error from this court was allowed by a judge of that court March 15, 1915, upon a petition therefor made by plaintiff's attorney in plaintiff's name. Citation was

issued conformably, March 22, 1915, of which service was admitted by defendants' attorneys March 23d. In April following attorneys for both sides stipulated that the plaintiff died February 28, 1915, while the cause was pending in the court below, that his administrator was duly appointed March 23, 1915, and that the administrator might be substituted, and application for an order of substitution was made accordingly by plaintiff's attorney, but was refused by the court below upon the ground that issuance of the writ of error had deprived it of jurisdiction over the cause. The facts are stated in the opinion.

Mr. John T. Casey, with whom *Mr. George F. Hannan* and *Mr. Chas. R. Pierce* were on the briefs, for plaintiff in error.

Mr. E. C. Hughes, with whom *Mr. Maurice McMicken*, *Mr. Otto B. Rupp* and *Mr. H. J. Ramsey* were on the brief, for defendants in error.

Mr. Chief Justice White delivered the opinion of the court.

This suit was brought under the Employers' Liability Act to recover damages resulting from injuries suffered by Nordgard while in the employ of the defendant railway company. The trial court directed a verdict for the defendants on the ground that there was no evidence tending to show that the defendants and Nordgard were engaged at the time of the accident in interstate or foreign commerce, and the case is here on writ of error to secure a reversal of the action of the court below affirming the judgment entered by the trial court dismissing the suit. 218 Fed. Rep. 737.

These are the facts: The defendant Stimson Mill Com-

pany was engaged in the logging and lumber business and carried its logs on its own logging railroad, the Marysville & Northern Railway, from timber land owned by it in Washington to a point near Marysville in that State where they were dumped into the waters of Puget Sound. Part of the logs were thereafter sold to mills located on the sound and the balance were rafted and taken by tugs to the Stimson Company's mills at Ballard, Washington, where they were manufactured into timber, which was thereafter sold, about twenty per cent. in local markets and the remainder in other States and countries. The logs which were sold after they had been carried to tidewater by the railroad were towed away by the purchasers to their mills or places for storage and part of them were subsequently re-sold for piling or poles to purchasers both within and without the State. Nordgard was a brakeman on the logging railroad and suffered the injuries for which he sued while engaged in unloading logs from the cars at tidewater.

The conclusion of the court below that under these facts the defendants were not engaged in interstate or foreign commerce when the injuries were suffered was based upon the decisions in *Coe* v. *Errol*, 116 U. S. 517, and *The Daniel Ball*, 10 Wall. 557, from the former of which the following quotations were made:

"When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State." 116 U. S. 517, 525.

"But this movement [that is, interstate commerce movement] does not begin until the articles have been

shipped or started for transportation from one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. . . . Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State." 116 U. S. 517, 528.

After pointing out that these rulings had not been modified, but on the contrary had been re-affirmed by the subsequent cases relied upon by the plaintiff in error (*Texas & New Orleans R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111; *Louisiana Railroad Commission* v. *Texas & Pacific Ry. Co.*, 229 U. S. 336; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498; *Ohio Railroad Commission* v. *Worthington*, 225 U. S. 101) the court said:

"In the case at bar there was no initial shipment of the goods. The transportation of the poles from the forest in which they were cut to tidewater, where they were sold, was not a shipment. There was no contract of carriage; there was no bill of lading; there was no consignor or consignee. The goods were not committed to a carrier. The defendant Mill Company simply carried over its own road, on its own cars, its own goods to a market where it sold and delivered them. It had no concern with the subsequent disposition of them. It was under no obligation to deliver them to another carrier, and no other carrier was under obligation to receive them or carry them further. The selling of the poles after the first sale by the Mill Company, or whether they were going outside of the State, depended upon chance or the exigencies of trade. The movement of the poles did not become interstate commerce until by the act of the purchasers thereof the

poles were started on their way to their destination in another State or country. The beginning of the transit which constitutes interstate commerce 'is defined in *Coe* v. *Errol*, to be the point of time that an article is committed to a carrier for transportation to the State of its destination, or started on its ultimate passage.' *General Oil Co.* v. *Crain*, 209 U. S. 211, 229."

The conclusion of the court below that the defendants were not engaged in interstate or foreign commerce when the accident occurred is, we think, clearly demonstrated by the reasoning by which it sustained its conclusion and the authorities upon which it relied as above stated, and its judgment should be affirmed.

Before concluding we observe that in view of the stipulation of the parties in the court below agreeing to the substitution as plaintiff in error of the administrator of Nordgard who died while the cause was there pending, the motion to dismiss on the ground that the writ of error was wrongfully allowed and that the administrator is not a proper party is based upon a mere irregularity which was waived.

Affirmed.